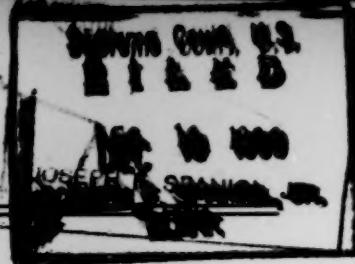


90-9110

No. _____



IN THE

Supreme Court of the United States

October Term, 1990

INTERSTATE BRANDS CORPORATION,
BUTTERNUT BREAD DIVISION,
Petitioner,

vs.

CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN AND
HELPERS, LOCAL UNION NO. 135,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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i.

QUESTIONS PRESENTED FOR REVIEW

- I. In order not to waive its right to judicial determination concerning the subject-matter arbitrability of a grievance under a collective-bargaining agreement, must a party contesting arbitrability refuse to submit to arbitration as an initial matter and force the grieving party to seek judicial intervention through an action to compel arbitration?
- II. May a court refuse to enforce an arbitrator's award on public policy grounds *only* when the award itself violates a statute, regulation or some other manifestation of positive law, or compels conduct by the employer that would violate such a law?

PARTIES BELOW

The names of all parties to the proceeding in the court below appear in the caption of the case.

Information required by Rule 29.1, Rules of The Supreme Court:

The parent company of Interstate Brands Corporation is IBC Holdings Corp.

Mrs. Cubbison's Food, Inc. is the only non-wholly owned subsidiary of IBC Holdings Corp.

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AND HELPERS, LOCAL UNION NO. 135,
*Respondent.***

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Sixth Circuit entered on July 26, 1990, which reversed the decision of the United States District Court for the Southern District of Ohio, Western Division, granting summary judgment in favor of Petitioner.

OPINIONS BELOW

The opinion of the Court of Appeals is contained in the Appendix at A1 and is reported at 909 F.2d 885. The opinion of the District Court is contained in the Appendix at A21 and is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 26, 1990. A Petition for Rehearing and Rehearing *En Banc* was timely filed by Petitioner on August 9, 1990. The Petition for Rehearing was overruled on September 11, 1990. Jurisdiction to review the judgment of the Sixth Circuit in this cause by a writ of certiorari is conferred on this Court by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Ind. Code Ann. §9-1-4-30(c):

The department shall not issue any license or permit hereunder:

* * *

(c) To any person who, it has been determined, is an habitual drunkard or who is addicted to the use of any narcotics or other habit forming or dangerous, depressant or stimulant drugs.

Ind. Code Ann. §9-11-2-1 through 9-11-2-3:

9-11-2-1. A person who operates a vehicle with ten-hundredths percent [.10%], or more, by weight of alcohol in his blood commits a class C misdemeanor.

9-11-2-2. A person who operates a vehicle while intoxicated commits a class A misdemeanor.

9-11-2-3. A person who violates section 1 or section 2 [9-11-2-1 or 9-11-2-2] of this chapter commits a class D felony if:

(1) He has a previous conviction of operating while intoxicated; and

(2) The previous conviction of operating while intoxicated occurred within the five [5] years immediately preceding the occurrence of the violation of section 1 or section 2 of this chapter.

Ky. Rev. Stat. Ann. §189A.010(1):

No person shall operate a motor vehicle anywhere in this state while under the influence of alcohol or any other substance which may impair one's driving ability.

Ky. Rev. Stat. Ann. §186.440(4):

An operator's license shall not be granted to:

* * *

(4) An habitual drunkard or drug addict;

Ohio Rev. Code Ann. §4507.08(A):

* * *

No temporary instruction permit or driver's license shall be issued to, or retained by:

(A) Any person who is an alcoholic, or is addicted to the use of controlled substances to the extent that the use constitutes an impairment to the person's ability to operate a motor vehicle with the required degree of safety;

Ohio Rev. Code Ann. §4511.19(A):

(A) No person shall operate any vehicle, streetcar, or trackless trolley within this state, if any of the following apply:

(1) The person is under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse;

(2) The person has a concentration of ten-hundredths of one per cent or more by weight of alcohol in his blood;

(3) The person has a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath;

(4) The person has a concentration of fourteen-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his urine.

STATEMENT OF THE CASE

The United States District Court, Southern District of Ohio, Western Division, had jurisdiction pursuant to Title 18, U.S.C. §1331.

Petitioner manufactures and distributes bread products. Grievant Randy Furst ("Furst") was employed by Petitioner as a driver/salesman. Furst drove a 20-foot bread truck to deliver bread products to stores, restaurants and schools. He covered routes in Kentucky and Indiana. He was represented by Respondent Union.

Petitioner and Respondent entered into a collective bargaining agreement ("Agreement"), effective from July 12, 1982, through July 13, 1985 (Appendix at A51). The parties agreed upon a grievance and arbitration procedure that expressly required that a grievance be filed, if at all, within 15 days of its occurrence. If it were not filed within 15 days of its occurrence, the grievance would "automatically be decided in favor of the defending party." Relevant portions of the Agreement include the following:

Article VI, Section 1:

The employer shall not discharge nor suspend any employee without just cause, but in respect to discharge or suspension shall give at least one (1) warning notice of the complaint against such employee to the employee, in writing, and a copy of the same to the Union, except that no warning notice need be given to an employee before he is discharged if the cause of such discharge is dishonesty or drunkenness, or recklessness resulting in serious accident while on duty, or the carrying of unauthorized passengers. The warning notice as herein provided shall not remain in effect for a period of more than twelve (12) months from the date of said warning notice. Discharge must be by proper written notice to the employee and the Union.

Article VII, Section 3(a):

It is agreed by the parties that all disputes or grievances shall be settled in accordance with the procedure outlined as follows in this Article. (a) The grievance shall be filed within fifteen (15) days of its occurrence, or the parties' awareness thereof and shall be reduced to writing by the complainant. In the event that such grievance is not submitted within this fifteen (15) day period, said grievance shall automatically be decided in favor of the defending party. In case of discharge the grievance shall be filed within five (5) days of its occurrence. (emphasis added).

Article VII, Section 3(f):

(f) The arbitrator may interpret the Agreement and apply it to the particular case presented, but the arbitrator shall have no authority to add to, subtract from, or in any way modify the terms of this Agreement or any agreement made supplementary hereto. (emphasis added).

On April 11, 1984, Furst was arrested in the Commonwealth of Kentucky by the Greater Cincinnati Airport Police. Furst, off duty and off Petitioner's premises, was in a van stopped on a road near the airport. The arresting officer, Officer David Bunning, observed that Furst was disoriented, his speech was slurred, and his breath smelled of alcohol. Officer Bunning also observed blood on Furst's arm. Furst told Officer Bunning that Bunning had interrupted him as he was trying to inject a solution of cocaine and water into his arm. Officer Bunning saw the syringe lying beside Furst's seat. When the officer asked Furst to leave the van, Furst had difficulty in standing. Furst had defecated and urinated in his pants. The officer saw that there were needle marks up and down Furst's arms. Officer Bunning testified about his encounter with Furst:

[Furst] had been down to a Cincinnati Reds ballgame. He and his friend had been drinking beer all day, smoking marijuana, I don't know if it was

there or on the way but he said they had been smoking marijuana plus he had stopped there to shoot up the cocaine. *And in further questioning I saw the needle marks. I asked him if he had a habit, he said yes, he had quite a habit; they were shooting up several times a day while he was working and off.* From the needle marks on his arms it appeared he had quite a problem at that time of arrest. (Emphasis added.)

Appendix at A97.

Officer Bunning summoned a paramedic. The paramedic's report recorded the existence of needle marks up and down both of Furst's arms (Appendix at A111). Furst was charged with three separate crimes: (1) possession of cocaine, a Class D felony; (2) possession of marijuana, a Class A misdemeanor; and (3) possession of drug paraphernalia.

Shortly thereafter, Fred Crofoot, Petitioner's General Manager, heard a rumor that Furst had been arrested on drug charges. On April 19, 1984, three company officials, including Crofoot, confronted Furst with the unconfirmed reports. Furst denied them.

On April 20, 1984 Crofoot received copies of the arrest report and the paramedic's report. On April 21, Crofoot once again confronted Furst with the charges. Furst again denied the whole incident and claimed that he had been framed. Crofoot immediately suspended Furst with the oral statement that the suspension would last until the criminal matter was "dismissed proving his innocence." Petitioner informed Respondent Union of Furst's suspension a day or so later. Under the Agreement, there is no requirement of written notice of suspension.

On June 8, 1984—48 days after he was suspended—Furst filed a grievance protesting the suspension. Petitioner denied the grievance because it was untimely under the Agreement.

On October 19, 1984, Furst was indicted on all three charges. On February 20, 1985, Kentucky's Boone County Circuit Court held a hearing on the propriety of Furst's entering into a felony diversion program which would require Furst to complete a drug-rehabilitation program and to refrain from committing a criminal act for one year. The Kentucky court approved the Diversion Agreement on February 25, 1985 under which the criminal charges would remain pending through February, 1986.

The hearing on the grievance, protesting Furst's suspension from employment, was held before Arbitrator Arthur R. Porter, Jr., on February 26, 1985, at Cincinnati, Ohio. Officer Bunning testified at the arbitration and brought the police-department file on Furst pursuant to a *subpoena duces tecum*. Petitioner asserted that Furst's grievance was not timely filed and that his suspension was for just cause. The issue of whether Petitioner should reinstate or discharge Furst, should the Arbitrator sustain the grievance protesting the indefinite suspension, was not before the Arbitrator.

The Arbitrator issued his written opinion on May 25, 1985. The Arbitrator asserted jurisdiction over the merits, sustained the grievance, and ordered Petitioner not only to end the indefinite suspension but to continue to employ Furst.

In July, 1985 Petitioner filed suit in the United States District Court for the Southern District of Ohio to vacate the Arbitrator's Award. The Union counterclaimed for enforcement.

The criminal charges against Furst were dismissed after he completed the Kentucky diversion program on February 25, 1986. On September 5, 1986, Furst was charged with driving under the influence and was found guilty of the reduced charge of reckless driving in Indiana. On October 23, 1986, Furst was fined for

speeding and driving under the influence and his driver's license was suspended for 30 days, after which he retained a probationary license which allowed him to drive in connection with employment activity (Appendix at A40-A41).

Following the filing of cross-motions for summary judgment, the District Court, on November 25, 1986, denied both cross-motions and remanded the case to the Arbitrator to render a final decision on backpay.

Following the Arbitrator's Supplemental Award and the submission of additional briefs, the District Court entered judgment on March 9, 1989, vacating the Arbitrator's Award and Supplemental Award. Respondent Union appealed.

On July 26, 1990 the Court of Appeals for the Sixth Circuit reversed the District Court. On August 9, 1990 Petitioner filed a petition for Rehearing and Rehearing *En Banc* which was denied on September 11, 1990. Petitioner now requests that a writ of certiorari be issued to review the decision and judgment of the Court of Appeals.

ARGUMENT

I. REASONS FOR GRANTING THE WRIT OF CERTIORARI

With respect to each Question Presented For Review the Sixth Circuit Court of Appeals has rendered a decision which conflicts with the decisions of other United States Courts of Appeals. Each represents an important question of federal law which has not been, but should be, settled by this Court.

II. FIRST QUESTION PRESENTED FOR REVIEW

In order not to waive its right to judicial determination concerning the subject-matter arbitrability of a grievance under a collective-bargaining agreement, must a party contesting arbitrability refuse to submit to arbitration as an initial matter and force the grieving party to seek judicial intervention through an action to compel arbitration?

In *Interstate Brands Corp., Butternut Bread Division v. Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union No. 135*, 909 F.2d 885 (6th Cir. 1990), the case at bar, the Sixth Circuit answered this question in the affirmative. Its decision is in conflict with decisions of the Courts of Appeals for the Seventh, Third, District of Columbia and First Circuits and raises an important question of federal law which should be resolved by this Court.

As stated above, Petitioner placed Furst on indefinite suspension on April 21, 1984. On June 8, 1984—48 days after he was suspended—Furst filed a grievance protesting the suspension. Petitioner denied the grievance as untimely. Under the collective-bargaining agreement a grievance must be filed within 15 days of its occurrence. If it is not, it is automatically decided in favor of the defending party.

At the arbitration, which occurred on February 26, 1985, Petitioner objected to arbitrability, citing the untimeliness of the grievance. Despite Petitioner's objections, the arbitrator asserted jurisdiction over the merits.

The Sixth Circuit has held that the issue of whether a grievance is time-barred is a "subject matter" of dispute and is for the court's determination. *General Drivers, Warehousemen and Helpers, Local Union 89 v. Moog Louisville Warehouse, Inc.*, 852 F.2d 871 (6th Cir. 1988) *aff'd without op. after remand* 892 F.2d 79 (1989). In the case at bar, the Sixth Circuit acknowledged this Court's holding that the question of whether a contract creates a duty to arbitrate a particular grievance is a question to be determined by the courts and not the arbitrator:

The Supreme Court has held that the question of arbitrability—whether the collective bargaining agreement at issue creates a duty to arbitrate a particular grievance—is a matter for judicial determination. *AT&T Technologies v. Communications Workers of America*, 475 U.S. 643, 649, 106 S. Ct. 1415, 1418, 89 L.Ed.2d 648 (1986) (citing *Warrior & Gulf, supra*, 363 U.S. at 582-83, 80 S. Ct. at 1352-53). See also *Distillery, Wine & Allied Workers Int'l Union, Local Union No. 32 v. National Distillers & Chemical Corp.*, 894 F.2d 850 (6th Cir. 1990).

Interstate Brands, 909 F.2d at 890.

However, in misplaced¹ reliance on *Vic Wertz Distributing Co. v. Teamsters Local 1038, National Conference of Brewery and Soft Drink Workers of the*

¹ *Vic Wertz* is distinguishable on its facts. The all-important language creating the arbitrability issue in *Vic Wertz* read as follows:

The grievance shall be presented to his supervisor within seven (7) calendar days of the event which created the claimed grievance, except that any disciplinary action, including
(Footnote continued on following page.)

United States of America and Canada, 898 F.2d 1136 (6th Cir. 1990), the Sixth Circuit evaded giving meaningful review to the issue of subject-matter arbitrability by holding that Petitioner's failure to refuse to arbitrate *as an initial matter*, despite making a record of its objections to arbitrability, constituted a waiver of its right to judicial review.

The Court's inference of such a waiver from *mere participation* in an arbitration hearing, without more, conflicts with the law in other circuits. In *International Assn. of Machinists & Aerospace Workers, Lodge 1777 v. Fansteel, Inc.*, 900 F.2d 1005 (7th Cir.) cert. den. _____ U.S. _____, 112 L. Ed. 2d 109, 111 S. Ct. 143 (1990), the Seventh Circuit held that precedent and public policy support a rule that permits a party to proceed with an arbitration hearing without waiving its right to later challenge the grievance's arbitrability in a judicial forum, provided it objected to arbitrability:

We are thus presented with the question of whether a party who has attempted to preserve its objections to arbitrability nonetheless waives these objections if it participates in an arbitration hearing.

900 F.2d at 1009. The *Fansteel* court answered the foregoing question in the negative, and reviewed the issue of arbitrability *de novo* without deference to the arbitrator's decision.

In *American Bakery & Confectionery Workers v. National Biscuit Co.*, 378 F.2d 918, 921-922 (3d Cir. 1967) the Third Circuit declined to adopt a rule that would:

(Footnote continued from preceding page.)

discharge, shall be deemed final unless a written grievance is presented to the employer or his authorized representative within three (3) working days from the time notice of such disciplinary action is given.

898 F.2d at 1138, n.2. Ambiguity existed in that language as to whether non-disciplinary matters—such as the vacation-pay dispute at issue in that case—would be "deemed final" if not timely grieved. No such ambiguity existed in this case, where the arbitrator ignored the plain language of the contract.

require a party disputing the issue [of arbitrability] to seek an injunction against arbitration before the proceedings commence, or to refrain from participating on that issue, or to seek court action immediately upon an arbitrator's affirmation of his own jurisdiction, at the penalty of waiver. No such procedure is required by statutory or decisional law, and in the few instances where a party has sought to impute a waiver of judicial jurisdiction in this manner, the argument has been found meritless. In our own federal litigation system we require no special jurisdictional appearances and permit no interlocutory appeals from a court's decision in favor of its jurisdiction. Since federal labor policy with respect to arbitration favors the establishment of a private juridical system there is even less reason to make resort to interstitial judicial activity mandatory, when the possibility exists that a labor dispute can be settled without any use of the courts whatsoever. Thus, where as here the reluctant party has presented its objection to arbitrability to the arbitrator and has not thereafter *clearly indicated its willingness to forego judicial review*, we believe that the issue is sufficiently preserved for our subsequent inquiry. (footnotes omitted; emphasis added).

Again, in *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 249 v. Western Pennsylvania Motor Carriers Association*, 574 F.2d 783 (3d Cir.) cert. den. 439 U.S. 828, 58 L. Ed. 2d 122, 99 S. Ct. 102 (1978), the Third Circuit declined to infer waiver of the Union's right to judicial determination of arbitrability from the Union's having signed the arbitration submission form and having argued the merits at arbitration. The court recognized that an arbitrator's decision on the merits must be reviewed narrowly, but insisted that "whether the arbitrator has jurisdiction over a particular dispute—i.e., whether the controversy is arbitrable—is a question for the court to decide" and is subject to a

"much broader and more rigorous judicial review." 574 F.2d at 787 (citations omitted). Both cases are cited with approval in *Pennsylvania Power Co. v. Local 272, International Brotherhood of Electrical Workers*, 886 F.2d 46 (3d Cir. 1989).

In *Davis v. Chevy Chase Financial Ltd.*, 667 F.2d 160 (D.C. Cir. 1981), a commercial-arbitration case, the Court of Appeals for the District of Columbia contrasted the standard to be used in reviewing the merits of an arbitrator's award (the award must stand unless it fails to "draw its essence" from the agreement) from that to be used in reviewing his authority to decide a particular issue, i.e., arbitrability (*de novo* review). The court held that plaintiff Davis did not lose the right to *de novo* review by submitting to arbitration and raising there the question of arbitrability.

In *Mobil Oil Corporation v. Local 8-766, Oil, Chemical & Atomic Workers International Union*, 600 F.2d 322 (1st Cir. 1979) the First Circuit held that in reviewing an arbitrator's award a court has an "obligation to make its own determination of the arbitrability of the dispute presented." *Id.* at 324. While a court may refer to an arbitrator's discussion on arbitrability in order to aid its determination, it must "make its own independent determination of this threshold issue." *Id.* at 325. See also, *Local 69, Utility Workers Union of America, AFL-CIO v. Boston Edison Company*, 752 F.2d 1 (1st Cir. 1984) (court has obligation to conduct independent review of arbitrability issue where parties have not agreed by contract or post-dispute stipulation to submit the issue of arbitrability to the arbitrator.)

The Sixth Circuit's inference that Petitioner waived its right to have a court decide arbitrability simply because it did not force the Union to file an action to compel arbitration reflects not only a split of judicial authority, but a conflict with an easily discerned public policy. The Sixth Circuit's decision has made inevitable a

flood of litigation concerning the arbitrability of grievances that will overwhelm the already crowded dockets of the federal courts.

One standard collection of only a portion of the thousands² of private arbitration awards rendered each year is BNA's *Labor Arbitration Cases*. In volume 93 and that portion of volume 94 published through July 25, 1990, a total of 413 labor-arbitration decisions are published. Of those cases 77, or almost 20%, involve challenges to arbitrability made to the arbitrator, challenges that now will be made to federal courts if the decision in this case is allowed to stand. BNA makes no pretence that it publishes all or even most of the arbitration cases decided in this country. Thus, for every arbitrability challenge that we know about, now submitted to an arbitrator instead of to a court, there are untold numbers of others waiting to enter crowded federal dockets. Such challenges will flood those dockets unless employers know that they can submit arbitrability issues first to an arbitrator without materially affecting their right to judicial determination.

It was partly to avoid the inevitable flood of such litigation that the Seventh Circuit reached its decision in *Fansteel*:

In permitting the arbitrator to attempt to address a dispute prior to a judicial arbitrability determination, parties may well be able to resolve their disputes without requiring the involvement of the judiciary. Furthermore, our upholding of the process does not discriminate in favor of the party who submits to arbitration of a grievance that it did not initiate subject to a later judicial arbitrability challenge. The party initiating arbitration has made a decision that the dispute is arbitrable when it

² The Federal Mediation and Conciliation Service reports 32,663 cases arbitrated through that federal agency in 1989. The American Arbitration Association reports that approximately 18,000 labor disputes are arbitrated under their rules annually.

initiates an arbitration proceeding. If that party felt the dispute was not arbitrable it would have chosen a forum other than arbitration. Thus, permission for the non-initiating party to preserve arbitrability objections following the arbitration hearing merely permits the non-initiating party to make the same decision concerning arbitrability that the initiating party made prior to submission of the decision to arbitrate and does not discriminate against the initiating party. Indeed, such a rule frequently is beneficial to the party who initiated arbitration in allowing that party access to the arbitral process without the necessity of the filing of a lawsuit to compel arbitration.

900 F.2d at 1009.

The Sixth Circuit's decision will make the involvement of the judiciary a *sine qua non* of labor arbitration. Questions inevitably will arise concerning the arbitrability-affecting minutiae of the pre-arbitration grievance process, such as the timeliness of the various procedural steps, including initial filing and the request for arbitration, the efficacy of service of contractually required notices, when the parties become "aware" of an alleged contractual violation, etc. The areas of possible dispute are practically limitless. However, parties to collective bargaining agreements will have no choice but to bring to the courts in the first instance every conceivable procedural or substantive objection to arbitration in order to preserve their right to judicial determination.

This is especially true since, with this case and *Moog*, the Sixth Circuit has created an unworkable rule. The *Moog* Court held that the untimely grievance at issue there presented a "subject-matter" issue since the relevant contract language described untimely grievances as "not . . . thereafter . . . arbitrable." Without explanation the Sixth Circuit announced that this language was somehow "different" from the language of

Oil, Chemical & Atomic Workers' International Union, Local 4-447 v. Chevron Chemical Co., 815 F.2d 338 (5th Cir. 1987) where a dispute involving timeliness was held to be for initial determination by the arbitrator. The *Chevron* arbitration clause provided, in event of untimely notification, that the grievance would be "considered abandoned." 815 F.2d at 339 n.1. Article XII, Section 10 of the *Chevron* contract provided: "Only grievances . . . which are processed . . . within the time limits herein provided shall be subject to arbitration." 815 F.2d at 341.

The parties to collective bargaining agreements employ myriad different phrases, each intending to describe the repose that is the proper consequence of an untimely grievance (e.g., "deemed settled," "dismissed," "decided in favor of defending party"). Unsure whether the language of their particular contract is more like *Moog* language or *Chevron* language, labor and management will be forced to ask the federal courts to determine each and every question concerning arbitrability before permitting an attempt at arbitral resolution.

Finally, the Court's finding that Petitioner waived its right to judicial determination of arbitrability is not in accord with the "real world" of actual labor-relations practice. Such standard arbitration treatises as Elkouri & Elkouri, *How Arbitration Works*, (4th ed. 1985) and Fairweather, *Practice and Procedure in Labor Arbitration*, (2d ed. 1983), contained in every labor attorney's library, reflect the usual practice that arbitrability issues are more commonly submitted to the arbitrator in the first instance. Elkouri notes that "the parties often leave arbitrability questions in the hands of the arbitrator . . ." Elkouri at 213. Fairweather states that a claim of untimely filing "more commonly" is presented as the first part of an arbitration hearing on the merits. Fairweather at p. 132. Fairweather advises that courts have held that a defense of nonarbitrability is

not lost because the party asserting it participated in a hearing on the merits, so long as the party asserts and preserves the defense:

Since the issue of nonarbitrability goes to the issue of the arbitrator's jurisdiction, the better rule would appear to be that participation in the arbitration does not constitute waiver. Such a rule would conform to the general judicial rule that lack of subject-matter jurisdiction is never waived.

Fairweather at p. 132, (citing Wright, *Federal Courts* (St. Paul; West Pub. Co., 1963), p. 244).

Nonetheless, the Sixth Circuit's decision appears to depend to some extent on its assumption that Petitioner engaged in "atypical" behavior in initially submitting the issue of timeliness to the arbitrator. In *Vic Wertz*, 898 F.2d at 1140, the Court observed: "The issue of arbitrability is typically raised initially in the district court by an action to compel or enjoin arbitration." The Court's sole support for this proposition is two cases, *George Day Construction Co. v. United Bhd. of Carpenters*, 722 F.2d 1471 (9th Cir. 1984) and *United Steelworkers v. Timken Corp.*, 717 F.2d 1008 (6th Cir. 1983). In both *George Day* and *Timken*, however, the parties initially had submitted issues of arbitrability to the arbitrator.

The Sixth Circuit's decision, without justification in legal precedent, public policy or practice, places at further risk the courts' already burdened dockets and makes inevitable delay, uncertainty and increased friction in the labor-relations world.

III. SECOND QUESTION PRESENTED FOR REVIEW

May a court refuse to enforce an arbitrator's award on public policy grounds *only* when the award itself violates a statute, regulation or some other manifestation of positive law, or compels conduct by the employer that would violate such a law?

This case raises the question expressly "left for another day" by this Court in *United Paperworkers International Union, AFL-CIO et al. v. Misco*, 484 U.S. 29, 98 L. Ed. 2d 286, 108 S. Ct. 364 (1987), 484 U.S. at 46, n.12. If the Court should so choose, the day for answering that question has arrived. The Sixth Circuit in *Interstate Brands, Butternut Bread Div. v. Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union No. 135*, 909 F.2d 885 (6th Cir. 1990) answered the question presented for review in the affirmative.

The Sixth Circuit did not dispute the testimony of Officer Bunning, whom the arbitrator believed, that Furst admitted to having "quite a habit." The Sixth Circuit did not dispute the specific finding of the arbitrator that "A driver who uses illegal drugs is a possible danger to himself, the company and the general public" (Appendix at A36). The Sixth Circuit did not dispute the existence of state laws prohibiting driving while under the influence. However, it reversed the district court because:

A careful reading of the district court's opinion reveals that it was in actuality evaluating Furst's behavior. The issue is not whether grievant's conduct for which he was disciplined violated some public policy or law, but rather whether the award requiring the reinstatement of a grievance (sic), i.e., "the contract as interpreted," *W.R. Grace*, 461 U.S. at 766, 103 S.Ct. at 2183, violated some explicit public policy.

The district court failed to identify any law or legal precedent with which that arbitrator's reinstatement order would conflict. While it is indisputable that allowing intoxicated persons to drive motor vehicles violates public policy, it does not follow, however, that any arbitration award reinstating an employee discharged for being intoxicated while off-duty, or arrested for off-duty possession of controlled substances may never be enforced without violating the public-policy exception of arbitration awards.

909 F.2d at 893. The Sixth Circuit not only viewed the underlying conduct of the discharged employee to be irrelevant to a public-policy analysis, it also expressed its intention to require enforcement of all arbitration awards unless an award, with its unique facts and circumstances, itself violates a specific "law or legal precedent." The Sixth Circuit reversed the district court in part for not identifying a specific law which would make illegal the reinstatement of a bread-truck driver who had undergone experiences parallel to Furst's.

The Sixth Circuit has adopted the test employed by the Court of Appeals for the District of Columbia in a pre-*Misco* decision, *United States Postal Service v. National Association of Letter Carriers, AFL-CIO*, 810 F.2d 1239 (D.C. Cir.) cert. granted 484 U.S. 984, 98 L. Ed. 2d 499, 108 S. Ct. 500 (1987), cert. dismissed as improvidently granted, 485 U.S. 680, 99 L. Ed. 2d 770, 108 S. Ct. 1589 (1988). In that case the court held that an arbitrator's award, reinstating a letter carrier who pled guilty to unlawful delay of the mail, did not violate public policy because the "Postal Service cannot identify any legal proscription against the reinstatement of a person such as [the grievant]." *Id.* at 1241.

The Ninth Circuit in *Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173, International Association of Machinists and Aerospace Workers*, 886 F.2d 1200 (9th Cir. 1989) cert. den. _____ U.S. _____, 109 L. Ed. 2d 531, 110 S. Ct. 2205 (1990),

purported not to reach the public-policy question left unanswered by *Misco*. The *Stead Motors* decision effectively answered the question in the same way as the Sixth Circuit when it enforced an arbitrator's award reinstating a mechanic who was discharged for failing to tighten properly the lug bolts on a car which he had serviced. Two statutes were relied upon by the district court in vacating the award, one concerning the operation of vehicles in an unsafe condition and the other concerning the inspection and certification of automobile repair facilities. The statutes were held by the Ninth Circuit to be insufficient to permit vacation on public-policy grounds because they did not expressly prohibit the reinstatement of an auto mechanic who had committed a reckless act.

However, even under the standard as applied by the Ninth Circuit in *Stead Motors*, Furst's suspension should have been upheld. The Ninth Circuit, unlike the Sixth, conceded that the discharged employee's reinstatement would violate public policy if he were likely to engage in wrongful conduct in the future:

... it is only if the grievant is likely to engage in wrongful conduct which violates public policy in the future that his reinstatement could be said to violate public policy.

Id. at 1217. The arbitrator in *Stead Motors* had made an assessment regarding the likelihood of the discharged employee's repeating his offensive conduct. The arbitrator in *Interstate Brands* made no such finding.

Indeed, the arbitrator in the case at hand, in a supplemental award deciding the issue of back pay, specifically found that on September 5, 1986, more than two years following the offense which caused his suspension, Furst was charged with driving under the influence and was found guilty of the reduced charge of reckless driving by an Indiana City Court. The arbitrator also found that on October 23, 1986 Furst was fined for

speeding and driving under the influence and that his license was suspended for thirty days. Furst, an habitual drug and alcohol user, had demonstrated that he was likely to continue to engage in wrongful conduct violative of public policy.

Petitioner asks this Court to review whether the Courts of Appeals for the Sixth, Ninth and District of Columbia Circuits have answered the question left open by *Misco* incorrectly. Petitioner asserts that those courts' interpretation of the public-policy exception is so narrow as to render it meaningless. Indeed, their interpretation could lead to absurd and harmful results. For example, an employer could be compelled to continue to employ as a security guard an employee guilty of rape or assault with a deadly weapon simply because there is no specific statute expressly forbidding such continued employment. The approach of the Courts of Appeals for the Sixth, Ninth and District of Columbia Circuits requires the enforcing of every arbitration award, no matter how harmful to the public good, unless the award is exactly reflected in the mirror of a prohibiting statute. Citizens who live within the jurisdiction of those courts deserve greater protection than such an approach affords.

The Courts of Appeals for the Eleventh, Eighth and Fifth Circuits have afforded the proper protection against dangerous results by answering the question left open by *Misco* in the negative. They have decided that an award may violate public policy without itself violating some specific statute, regulation or other manifestation of positive law.

In *Delta Airlines v. Airlines Pilots Association International*, 861 F.2d 665 (11th Cir. 1988) *reh. den., en banc* 867 F.2d 1431, *cert. den.* _____ U.S. _____, 107 L. Ed. 2d 154, 110 S. Ct. 201 (1989) the Eleventh Circuit rejected the "mirror" approach embraced by the Sixth Circuit. The Eleventh Circuit upheld the vacation of an arbitration award reinstating a pilot who had been

discharged for flying drunk, although no specific statute or regulation made it illegal for Delta to reinstate a pilot who had once flown drunk.

Moreover, the Eleventh Circuit did not consider the pilot's underlying conduct to be irrelevant to its public-policy analysis:

As noted above, *Misco* requires the finding of a well defined public policy and an award that conflicts with that policy. The public policy of which the Supreme Court speaks in *Misco* seems to be a public policy not addressing the disfavored conduct, in the abstract, but disfavored conduct which is *integral to the performance of employment duties*. The question we are instructed, by *Misco*, to ask is . . . "Does an established public policy condemn the performance of employment activities in the manner engaged in by the employee?"

861 F.2d at 671.

The Eleventh Circuit properly held that Delta should not be required to reinstate an employee whose misconduct was integral to the performance of his employment duties. To have enforced the arbitration award would have been to compel Delta to submit to arbitration the question of whether it should authorize operation of aircraft by pilots while they are drunk. The court recognized that there exists an explicit, well defined and dominant public policy which would prohibit Delta from entering into such an agreement.

Likewise, Petitioner seeks recognition of the explicit, well defined and dominant public policy prohibiting it from agreeing to comply with an arbitration award that requires it to authorize operation of its bread trucks by drivers who "shoot up" cocaine several times a day. The *Delta* court recognized such a policy:

With the advent of the automobile came the need for laws against drunk driving. The substitution of mechanical power for that of horses and mules, as

well as the increased speed capability of the automobile, heightened the dangers of vehicular traffic. In response to this, the people, through their elected representatives, passed laws which made it a crime to drive an automobile while intoxicated. Today it is universally accepted throughout the country that the operation of a motor vehicle while drunk is a crime.

861 F.2d at p. 672.

The district court in *Interstate Brands* also recognized that the reinstatement of Furst would violate the public policy of Ohio,³ Kentucky, and Indiana as expressed in their laws outlawing driving under the influence. Section 4511.19(A) of the Ohio Revised Code provides that no person shall operate any vehicle under the influence of alcohol or drugs. Ohio Rev. Code Ann. §4511.19(A) (Anderson Supp. 1988). Section 4507.08(A) states that no operator's or chauffeur's license shall be issued to a person who is alcoholic or addicted to the use of controlled substances to the extent that the use constitutes an impairment to the person's ability to operate a motor vehicle safely. Ohio Rev. Code Ann. §4507.08 (Anderson Supp. 1988).

In Kentucky, Section 189A.010 provides that no person shall operate a motor vehicle anywhere in the state while under the influence of alcohol or any other substance which may impair one's driving ability. Ky. Rev. Stat. Ann. 189A.010(1) (Miche 1989). Section 186.440 proscribes the granting of an operator's license to an habitual drunkard or drug addict. Ky. Rev. Stat. Ann. §186.440(4) (Miche 1989).

In Indiana, an individual who operates a motor vehicle while intoxicated—which by definition includes being under the influence of a controlled substance or drug—commits a Class A misdemeanor. Ind. Code Ann. §9-11-2-2 (Burns 1987). Indiana also proscribes the

³ Ohio is the location of Petitioner's central distribution site.

issuing of a driver's license to any person who is "an habitual drunkard or who is addicted to the use of narcotics or other habit forming or dangerous, depressant or stimulant drugs." Ind. Code Ann. §9-1-4-30(c) (Burns 1987).

The Eleventh Circuit recently confirmed its rejection of the Sixth Circuit's approach in *Georgia Power Company v. International Brotherhood of Electrical Workers, Local Number 84*, 707 F. Supp. 531 (N.D. Ga. 1989), *aff'd* 896 F.2d 507 (11th Cir. 1990). The discharged employee in *Georgia Power* was an auxiliary-equipment operator whose job was to insure that the high-pressure equipment in the plant did not overheat and that all valves were in the proper position. As part of a random search marijuana was discovered in his car. In a subsequent medical exam the employee tested positive for marijuana use and was terminated. Although the arbitrator agreed that the employee was a chronic drug user, he reinstated him. The Court of Appeals affirmed the vacation of this award as violating the public policy against the operation of potentially hazardous equipment and machinery by employees under the influence of illegal drugs.

The *Georgia Power* court relied on laws and legal precedents which generally address various aspects of controlled-substance use. The court cited no authority which specifically prohibited the Company from reinstating an auxiliary-equipment operator in whose car was found marijuana and who once tested positive for marijuana use.

At least three other Courts of Appeals have rejected the interpretation of *Misco* adopted by the Sixth Circuit. In *Iowa Electric Light and Power Company v. Local 204 of the International Brotherhood of Electrical Workers, et al.*, 834 F.2d 1424 (8th Cir. 1987), the Eighth Circuit Court of Appeals affirmed the vacation of an arbitrator's award reinstating a discharged nuclear-plant employee

who deliberately defeated the interlock system which controlled the doors of the secondary-containment area. The union argued that there was no well defined and dominant public policy specifying that workers who violate secondary-containment areas at nuclear-power plants must be fired. The Eighth Circuit declined to require illegality of the reinstatement as a basis for a public-policy exception:

This Court is not required to find that the award itself is illegal before we overrule the arbitrator on public policy grounds. The Supreme Court in *United Paperworkers* declined to reach the issue of whether such a requirement is to be read into the public policy exception. 'We need not address the Union's position that a court may refuse to enforce an award on public policy grounds only when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law.' _____ U.S. _____, n.12, 108 S.Ct. 374, n.12. In *Muschany*, the Supreme Court based the public policy exception on 'definite indications in the law of sovereignty,' 324 U.S. at 66, 65 S.Ct. at 451—not just on 'definite laws,' as Schott's Union argues. An arbitrator may be overruled 'when the award, although not requiring illegal conduct, is said to be inconsistent with some significant public policy.' [citations omitted].

834 F.2d at 1427, n.3.

That there is a public policy requiring strict adherence to nuclear safety rules was enough for the Eighth Circuit to conclude that the policy was violated by the reinstatement of an employee who had deliberately broken those rules. The existence of specific statutes prohibiting impaired driving should have been enough for the Sixth Circuit to conclude that the reinstatement of an employee with a severe cocaine and alcohol habit also violated public policy.

An approach similar to the Eleventh Circuit's was recently applied by the Second Circuit in *Newsday, Inc. v. Long Island Typographical Union, No. 915, CWA, AFL-CIO*, 915 F.2d 840 (2d Cir. 1990). The Second Circuit affirmed the vacation of an arbitration award reinstating an employee who was fired for repeated incidents of sexual harassment. Relying only on the various sex-discrimination laws which have been interpreted generally to prohibit sexual harassment, the court cited no positive law expressly forbidding the reinstatement of an employee who previously had "mov[ed] his hand down [one co-worker's] back from her rib cage to her waist, slapp[ed] . . . [another co-worker] on her rear end, and slamm[ed] into [a third's] back." *Id.* at 843. Indeed, it would be impossible for the legislature to anticipate and specifically proscribe every possible behavior in the workplace that might constitute sexual harassment deserving of discharge.

In a pre-*Misco* decision the Fifth Circuit adopted a standard consistent with the post-*Misco* decisions of the Eighth, Eleventh and Second Circuits. In *Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local Union 540 v. Great Western Food Company*, 712 F.2d 122 (5th Cir.) *reh. den.* 717 F.2d 1399 (1983), the Court of Appeals, reversing the district court, refused to enforce an award reinstating an over-the-road trucker who was caught drinking alcohol on duty. The award, while not itself violative of any specific statute or regulation, violated the explicit public policy against allowing a professional driver to continue driving duties after having been caught drinking on the job.

In a nation where motorists practically live on the highways, no citation of authority is required to establish that an arbitration award ordering a company to reinstate an over-the-road truck driver caught drinking liquor on duty violates public policy. Alcohol impairs a person's coordination, and inhibits his ability to reason rationally. Ingestion of alcohol slows the reflexes. It induces drowsiness. It

slows response time to external stimuli. It dulls the senses. In recognition of alcohol's undisputedly debilitating characteristics, every state in the union prohibits driving under its influence. A driver who imbibes the spirits endangers not only his own life, but the health and safety of all other drivers. These considerations are convincing enough with respect to drivers of automobiles. They become even more compelling when the driver is regularly employed to course the highways in a massive tractor-trailer rig.

712 F.2d at p. 124.

The Sixth Circuit, while acknowledging the "schism" between the Ninth Circuit (*Stead Motors*) and the Eighth and Eleventh Circuits (*Iowa Electric* and *Delta Airlines*), attempted to avoid entanglement by purporting to factually distinguish *Iowa Electric* and *Delta Airlines* as involving "on-duty" misconduct. 909 F.2d at 894, n.11. Despite this disclaimer, the Sixth Circuit clearly has aligned itself with the approach taken by the Ninth and District of Columbia Circuits. Its purported factual distinction rests upon misreading of *Iowa Electric* and *Delta* as well as illicit fact-finding.

Neither *Iowa Electric* nor *Delta Airlines* depended upon the disfavored conduct's having occurred "on-duty." Rather, both cases held that disfavored conduct violated public policy if it was "inextricably related" to the performance of employment duties. The "relation" test is not limited to an on-duty/off-duty analysis.

Moreover, the Sixth Circuit improperly engaged in fact-finding when it inaccurately stated that Furst was merely guilty of "being intoxicated while off-duty [and being] arrested for off-duty possession of controlled substances." 909 F.2d at 893. The Sixth Circuit improperly ignored the testimony of Officer Bunning, a witness whom the arbitrator believed. Officer Bunning testified that he saw needle marks up and down Furst's arms and heard Furst's admission that he had "quite a habit" and was "shooting up several times a day" while

working and off (Appendix at A97). The actual facts, as found by the arbitrator and accepted by the district court, demand vacation of the arbitrator's award since, as the Sixth Circuit recognized: "... it is indisputable that allowing intoxicated persons to drive motor vehicles violates public policy." 909 F.2d at 893.

The Sixth Circuit's public-policy analysis was further flawed by its mischaracterization of the state laws of Ohio, Kentucky and Indiana. The Sixth Circuit described those states' laws as prohibiting driving only by those whose licenses have been revoked. This finding totally ignored those laws which prohibit driving while intoxicated. O.R.C. §4511.19(A), K.R.S.A. 189A.010(1) and Ind. Code Ann. §9-11-2-2. The statutes ignored by the court embody an explicit, well defined and dominant public policy against the reinstatement of a controlled-substance abusing truck driver.

The Sixth Circuit's finding that the district court failed to review existing law and legal precedents in order to determine the existence of a well defined and dominant public policy is also incorrect as a matter of record. The Sixth Circuit stated that "... the only legal citation provided by the district court is an undifferentiated reference to *Misco*." 909 F.2d at 893. However, the district court specifically relied on the drunk-driving laws of the three states:

We believe this is a case where reinstatement would violate public policy of *Ohio, Kentucky and Indiana* as expressed in *their laws outlawing driving under the influence* . . (emphasis added).

(Appendix at A25-A26). The district court's reliance on those laws cannot be ignored merely because it did not undertake the clerical task of writing in the statutory cites. This is particularly true since the district court's opinion was a decision on the parties' cross-motions for summary judgment and Petitioner had cited to the court laws and legal precedent against impaired driving in its memorandum in support (Appendix at A128-A129).

Finally, the Sixth Circuit mischaracterized the district court's treatment of Furst's post-award convictions as a "review of an arbitrator's judgment on procedural issues . . ." 909 F.2d at 894 (citing *Misco*, 484 U.S. at 40 citing *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557, 84 S. Ct. 909, 918, 11 L. Ed. 2d 898 (1964)):

... we find that the district court engaged in impermissible fact finding in basing its decision to vacate Furst's reinstatement in part upon evidence excluded by the Arbitrator; namely, Furst's conviction for reckless driving and driving under the influence.

909 F.2d at 894. However, the arbitrator did not "exclude" the evidence of Furst's later convictions. In his Supplemental Award he accepted the convictions as uncontested by the parties and specifically found that they had occurred (Appendix at A40, A41, A50).

Given the arbitrator's specific finding that Furst was twice convicted of impaired-driving offenses in 1986, the district court's consideration of those convictions in its public-policy decision was in accord with this Court's decision in *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber Workers*, 461 U.S. 757, 766, 76 L. Ed. 2d 298, 103 S. Ct. 2177 (1983). *W.R. Grace* recognized that "the question of public policy is ultimately one for resolution by the courts." As the *Iowa Electric* court observed:

Because collective bargaining agreements do not formulate public policy, and arbitrators cannot consider matters not encompassed by the governing agreements, 'the question of public policy is ultimately one for resolution by the courts.' *Id.* (citing *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubbers Workers*, 461 U.S. 757, 766 (1983). Once the public policy question is raised,

we must answer it by taking the facts as found by the arbitrator, but reviewing his conclusions *de novo*. [citations omitted].

834 F.2d at p. 1427.

The district court accepted the facts as found by the arbitrator. However, the district court was not bound by the arbitrator's conclusions with regard to those facts. The arbitrator was charged with determining just cause for suspension and, if necessary, the appropriate remedy. He was not charged with determining the existence of a public policy or whether his award conflicted with it. The district court properly considered the post-award convictions in his public-policy analysis and properly determined that the inevitable consequence of the award would be to compel the motoring public to share the highway with an habitual cocaine and alcohol user. Petitioner urges this Court to grant review of the Sixth Circuit Court of Appeals' reversal of the district court's entirely proper judgment.

CONCLUSION

Petitioner urges this Court to grant a writ of certiorari to review the questions presented for review. Both address questions of great national significance on which the nation's Courts of Appeals are divided.

Respectfully submitted,

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APPENDIX

**OPINION OF THE COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

*RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24*

No. 89-3287

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

INTERSTATE BRANDS CORPORATION,
Butternut Bread Division,
Plaintiff-Appellee.

v.

CHAUFFEURS, TEAMSTERS,
WAREHOUSEMEN AND HELPERS
LOCAL UNION NO. 135,
Defendant-Appellant.

ON APPEAL from the
United States District
Court for the South-
ern District of Ohio

Decided and Filed July 26, 1990

Before: KENNEDY, WELLFORD, and
SUHRHEINRICH*, Circuit Judges.

SUHRHEINRICH, District Judge, delivered the opinion of the court, in which KENNEDY, Circuit Judge, joined. WELLFORD, Circuit Judge, (pp. 19-20) delivered a separate concurring opinion.

*The Honorable Richard F. Suhrheinrich was appointed to the United States Court of Appeals on July 10, 1990. Judge Suhrheinrich was a United States District Judge for the Eastern District of Michigan, sitting by designation, when this case was argued.

SUHRHEINRICH, District Judge. Appellant Teamsters Local Union No. 135 ("Union" or "Local 135") appeals the district court's decision vacating the initial and supplemental awards of a labor arbitrator rendered pursuant to a collective bargaining agreement between the Union and Interstate Brands Corporation ("Interstate" or "Company"). Because we find that the district court erred in vacating the arbitrator's award, we reverse.

Interstate is a manufacturer and distributor of bread and bread-related products. Interstate and Local 135 were parties to a collective bargaining agreement ("Agreement") from August 25, 1982 through July 13, 1985 covering a bargaining unit of driver-salesmen employed out of Interstate's Versailles and Madison, Indiana facilities. Article VI of the Agreement limited the Company's right to discharge or suspend an employee for "just cause" only and required that any suspension or discharge be preceded by one warning notice, in writing, unless the employee was discharged for "dishonesty or drunkenness." Article VII provided that a grievance had to be filed "within fifteen (15) days of its occurrence, or the parties awareness thereof. . ." and also included a clause which stated: "In the event that such grievance is not submitted within this fifteen (15) day period, said grievance shall automatically be decided in favor of the defending party." Article VII 3(a). Finally, section 3(f) of Article VII authorized the arbitrator to interpret and apply the Agreement but also cautioned that the arbitrator "shall have no authority to add to, subtract from, or in any way modify the terms of this Agreement. . .".

Grievant Randy Furst ("Furst" or "Grievant") was a driver/salesman for Interstate who drove a 20-foot step van to deliver Interstate's products to stores, restaurants, and schools. At the time of the incident giving rise to the instant dispute Furst had ten years of seniority with Interstate.

On April 11, 1984, on his day off, Furst and a friend were arrested by the Greater Cincinnati Airport police on a road

near the airport. They were driving a non-company vehicle. When an officer with the Kenton Airport Authority approached the stopped van, he found Furst, who was seated in the passenger seat, in a disoriented condition with slurred speech and alcohol on his breath. After noticing a white powdery substance in a plastic bag on the van's motor cover, the officer arrested Furst and his friend. The officer also observed blood and needle marks on Furst's arm and summoned a paramedic. Upon questioning, Furst told the officer that he was attempting to shoot up cocaine when the officer arrived.

Furst was charged under Kentucky law with possession of cocaine, marijuana, and drug paraphernalia. The State of Kentucky agreed not to prosecute Furst and to dismiss all charges against him on the condition that Furst complete a drug rehabilitation program and not commit any criminal act for twelve months. On February 25, 1986, one year after the diversion agreement was entered by the Kentucky court, Furst successfully completed all the conditions of the diversion agreement and all criminal charges against him were dismissed.

On April 13, 1984, Interstate's General Manager was informed that Furst had been arrested on drug charges. On April 19, 1984, representatives of the company confronted Furst with the unconfirmed reports. Furst denied the rumors. Interstate received copies of the police report on April 20, 1984, and once again confronted Furst, who denied the report's account of the incident. The Company suspended Furst on April 21, 1984, stating orally that his suspension would last "until this thing was dismissed proving his innocence." Furst filed the grievance protesting his indefinite suspension on June 8, 1984, forty-eight days after he was suspended. Interstate denied the grievance as untimely.

The parties were unable to settle Furst's grievance and selected an arbitrator, Arthur R. Porter, to hear and decide 1) whether the grievance was arbitrable; and 2) whether there

was just cause for the suspension of Furst. On May 25, 1985, the arbitrator issued an award sustaining the grievance and ordering Interstate to end the suspension and to reinstate the grievant. He also granted appropriate back pay and benefits.

In that award the arbitrator found that Furst did use cocaine and that the Company was warranted in its initial suspension of Furst pending a more complete investigation of the circumstances leading to Furst's arrest. The arbitrator also found that Furst and Local 135 had lost their right to protest the initial suspension by failing to file a grievance within fifteen days of the suspension. Notwithstanding, he further found that the suspension was a "continuing act" which could be grieved at any time. In setting aside the suspension the arbitrator stated that the Company's decision had placed Furst in a difficult position since his reinstatement was made contingent upon an impossible condition; namely, a judicial disposition of his innocence. He also noted that Interstate had no guidelines or policies to judge off-the-premises, off-hour activities by a driver/salesman, and stated that the policies established for in-plant employees were "contradictory and confusing." In this regard, he pointed out that Interstate's representative had testified that an employee convicted of "driving under the influence" would not have been penalized as long as the illegal act occurred outside normal work hours and off the premises.

Interstate subsequently filed suit in federal district court to vacate the arbitrator's award. The Union counterclaimed for enforcement. Following the filing of cross-motions for summary judgment, the district court denied both motions and remanded the case to the Arbitrator to render a final decision on back pay. On August 20, 1988, the arbitrator found a six-month suspension to be appropriate and ordered back pay from October 11, 1984, minus any interim earnings, unemployment compensation received, and compensation which Furst would not have been able to earn during a twenty-two day period in 1987 when his driver's license was

temporarily suspended as a result of a conviction for driving while under the influence of alcohol.¹

On March 9, 1989, the district court vacated the arbitration award and supplemental award on the grounds that the grievance was not timely filed and that the arbitrator had exceeded his authority in the interpretation of the labor contract. Further, in *obiter dicta*, the district court stated that Furst's reinstatement violated a well-defined public policy against permitting habitual users of mind-altering illegal drugs from operating motor vehicles.

The Union now appeals from this decision, contending that the district court, in vacating the arbitration awards, exceeded its authority by substituting its judgment for that of the arbitrator on the issue of whether the grievance was timely filed, and erred in its determination that the award requiring the reinstatement of the grievant violated public policy.

I.

It is a well-established principle that courts play only a limited role in reviewing labor arbitration awards. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987). In *Misco*, the Supreme Court reaffirmed its longstanding

¹On September 5, 1986, Furst was charged with driving under the influence, and was found guilty of the reduced charge of reckless driving by the Batesville, Indiana City Court. On October 23, 1986, Furst was fined \$72.00 for speeding, \$277.00 for driving under the influence, and his driver's license was suspended for thirty days and thereafter the suspension was converted to a probationary driver's license, the probationary status of which terminated on June 7, 1987. Under the terms of the probation, Furst was allowed driving privileges to and from work and in connection with employment activities during the day. The Arbitrator, however determined that these incidents did not require modification of the reinstatement remedy because the actions occurred one and one-half years after the arbitration award and two and one-half years after the suspension.

commitment to the highly deferential standard of review of arbitrator's decisions, a principle which has its genesis in the *Steelworkers Trilogy*.² In those landmark labor cases, the Supreme Court stated that "the federal policy of settling labor disputes by arbitration would be undermined if the courts had the final say on the merits of the awards." *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960). Under this line of authority a court may not reconsider the merits of an award even when the parties allege that the award rests on errors of fact or on misinterpretation of the Contract. *Misco*, 484 U.S. at 36. As long as the arbitrator's award "draws its essence from the collective bargaining agreement," and is not merely the arbitrator's 'own brand of industrial justice,' " the Court must enforce the award. *Id.* (quoting *Enterprise Wheel*, 363 U.S. at 597).

In *Misco, supra*, the Supreme Court defined the scope of judicial review of arbitration awards as follows:

Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. To resolve disputes about the application of a collective-bargaining agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator's interpretation of the contract. The arbitrator may not ignore the plain language of the

²*United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960)(collectively the "Steelworkers Trilogy").

contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a Court should not reject an award on the ground that the arbitrator misread the contract [A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

Misco, 484 U.S. at 37-38.³ This Court has recently expressed its adherence to the principles discussed in *Misco, supra*. *Eberhard Foods, Inc. v. Handy*, (868 F.2d 890, 891 (6th Cir. 1988) (noting that the *Misco* Court "again advised lower federal courts to be more deferential to the arbitration process").

This highly deferential standard of review is perhaps most commonly extended to the substantive issue of what consti-

³The *Misco* court's characterization of the role of judges in the process of collective bargaining is an affirmation of prior Supreme Court pronouncements on the subject:

The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.

The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim.

Steelworkers v. American Manufacturing Co., 363 U.S. 564, 567-568 (1960) (footnotes omitted); *see also AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649-650 (1986).

tutes sufficient and reasonable cause for discharge. *Florida Power Corp. v. IBEW Local 433*, 847 F.2d 680, 681-82 (11th Cir. 1988) (and cases cited therein). *See also Anaconda Co. v. Machinists District Lodge No. 27*, 693 F.2d 35, 37 (6th Cir. 1982) ("'just cause' . . . has frequently been upheld as the basis for an arbitrator's award"). In the question of procedural arbitrability, a court's role is even more sharply circumscribed. The Supreme Court observed in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547 (1964), that when the subject matter of a dispute is arbitrable, "procedural" questions which grow out of the dispute and bear on its final disposition are the exclusive province of the arbitrator. In *Misco, supra*, the Court held that an arbitrator's procedural rulings must not be disturbed by a court unless the arbitrator's error is "in bad faith or so gross as to amount to affirmative misconduct." 404 U.S. at 40.

On appeal the Union asserts that the arbitrator's ruling on the timeliness issue is a matter of procedural arbitrability. Thus, it argues that the district court erred in failing to apply the "affirmative misconduct" standard of review set forth in *Misco* when it vacated the award. Interstate counters that the question of whether a contract creates a duty to arbitrate a particular grievance is initially a question for the courts and that in the instant case, the language of the Agreement indicates a clear intention by the parties to foreclose the arbitration of untimely grievances altogether. In the alternative, Interstate argues that the arbitrator's ruling is not subject to the "affirmative misconduct" standard of review, but rather is properly evaluated under the standard of review applied to substantive rulings of an arbitrator. Under this standard, Interstate argues that the arbitrator exceeded his authority under the Agreement when he found that Furst's suspension was a continuing act that could be grieved at any time and that his award fails to "draw its essence from the contract."

A.

Before we can address the Union's argument that the arbitrator's ruling on arbitrability is properly reviewed under the *Misco* "affirmative misconduct" standard, we must first examine the Company's contention that the issue of arbitrability is initially a question for the court. The Supreme Court has held that the question of arbitrability--whether the collective bargaining agreement at issue creates a duty to arbitrate a particular grievance—is a matter for judicial determination. *AT&T Technologies v. Communications Workers of America*, 475 U.S. 643, 649 (1986)(citing *Warrior & Gulf, supra*, 363 U.S. at 582-83).⁴ See also *Distillery, Wine & Allied Workers Int'l Union, Local Union No. 32 v. National Distillers & Chemical Corp.*, 894 F.2d 850 (6th Cir. 1990). On the other hand, a panel of this court most recently held that when the parties have submitted the issue of arbitrability to the arbitrator rather than reserving the question for initial determination by the court, the arbitrator's decision on arbitrability must stand "unless it fails to 'draw its essence from the collective bargaining agreement.' " *Vic Wertz Distributing Co. v. Teamsters Local 1038, National Conference of Brewery and Soft Drink Workers of the United States of America and Canada*, 898 F.2d 1136 (6th Cir. 1990)(citation omitted).

In the present Case, as in *Vic Wertz*, the parties submitted the issue of arbitrability to the arbitrator in the first instance.

⁴Similarly, in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), the Supreme Court stated:

Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into the parties. . . . The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty.

Id. at 546-47 (citations omitted).

By participating in the arbitration proceedings, Interstate implicitly agreed to have the arbitrator decide the issue of timeliness, and hence arbitrability, *Vic Wertz* 897 F.2d at 1140; and thereby waived its right to have the court make those rulings. Thus, the nature of our review of the arbitrator's ruling on arbitrability is different than the situation where the Company refused to arbitrate altogether and the Union brought an action in district court to compel arbitration. A case cited by Interstate, *General Drivers, Warehousemen and Helpers, Local Union 89 v. Moog Louisville Warehouse Inc.*, 852 F.2d 871 (6th Cir. 1988), *reh'g denied* (Sept. 30, 1988), *appeal after remand*, 892 F.2d 79 (6th Cir. 1989) (TABLE) (per curiam), is therefore distinguishable from the instant case. In *Moog*, unlike the case before us, the company had refused the union's demand for arbitration, contending that the request made was untimely and rendered the grievance not arbitrable. 852 F.2d at 072. The union then brought an action in district court to compel the company to arbitrate.

This court held that the contractual language in that case clearly indicated that the particular grievance in dispute was excluded from arbitration unless the court first found that the union had met the conditions precedent to arbitration. 852 F.2d at 875.

B.

Our determination that *Vic Wertz* governs Interstate's argument on the arbitrability issue also disposes of the Union's contention that the arbitrator's ruling on the arbitrability of a grievance is a purely procedural question within the exclusive purview of the arbitrator and therefore subject to the "affirmative misconduct" standard set forth in *Misco*. As made clear in *Vic Wertz*, we cannot overturn the arbitrator's ruling on arbitrability unless we find that his decision "fails to draw its essence from the collective bargaining agreement.

The district court vacated the arbitrator's award because it concluded that the grievance was not timely filed and that there was no ambiguity in the agreement warranting the arbitrator's interpretation of "occurrence." The court relied upon the standard of review set forth in *Dobbs, Inc. v. Teamsters Local 614*, 813 F.2d 85 (6th Cir. 1987), a pre-*Misco* decision, where the court held that an arbitrator's interpretation of the substantive terms of a collective bargaining agreement is not to be disturbed unless the arbitrator's award "fails to draw its essence" from the agreement. The Union argues on appeal that the arbitrator's interpretation of "occurrence" was reasonable in the context of the *sui generis*⁸ form of discipline selected by Interstate. While we do not find fault with the standard of review employed by the district court, we disagree with the district court's analysis.

The arbitrator determined that under the Agreement Furst's delay in filing the grievance resulted in his having waived the right to challenge the suspension of April 21, 1984. Despite this delay, the arbitrator concluded that the grievance was arbitrable as a continuing grievance that could be grieved at any time, "even though that grievance emphasizes the act of suspension rather than its continuing nature." Arb. Award at 6. Interstate contends that in so ruling, the arbitrator ignored the "unambiguous" language in Article VII, Section 3(a) of the Agreement requiring that a grievance be filed within fifteen (15) days of "its occurrence or the parties' awareness thereof. Specifically, Interstate contends that the conclusion that Furst had waived his right to challenge the April 21, 1984 suspension should have been the end of

⁸An indefinite suspension, the continuation of which is conditioned upon some future event, such as the outcome of criminal proceedings pending against an employee, is unlike a discharge or suspension for a definite length of time and is instead a *sui generis* form of discipline, the propriety of which can be judged *only* on the basis of subsequent awards. *Brown v. Dept. of Justice*, 715 F.2d 662, 669 (D.C. Cir. 1983).

the arbitrator's inquiry. Interstate argues that this ruling violates the provision of the Agreement which deprives the arbitrator of the authority to "add to, subtract from or in any way modify" the terms of the Agreement. Finally, Interstate argues that the arbitrator superimposed his own notions of industrial fairness by reaching beyond the clear language of the Agreement to decide that the suspension was a "continuing act." Therefore, Interstate maintains that under *Misco*, the arbitrator's award fails to "draw its essence from the contract" and was therefore properly set aside by the district court.

Interstate asks this Court to give a narrow interpretation to the term "occurrence." However, as the Supreme Court held in *Misco*, contract interpretation is the exclusive province of the arbitrator. While the "arbitrator may not ignore the plain language of the contract," we would not be free to vacate his award even if we were convinced that he has committed a "serious error." *Misco*, 484 U.S. at 38. Here, the arbitrator's finding that the suspension was a "continuing act" or "occurrence" which could be grieved at any time does not appear to be based upon a misreading or modification of the language of the Agreement. The indefinite nature of Furst's suspension contemplated a continuing, day-to-day suspension (i.e., "occurrence"), the termination of which was to be conditioned upon a future event, the proving of his innocence. Rather, the arbitrator was construing the terms of the agreement, in particular the terms "occurrence" and "awareness," in light of an indefinite suspension pending the conviction or acquittal of an employee in a criminal case. Because we fail to see any inconsistency or contradiction between this ruling and any other language in the Agreement and we further find that the arbitrator was at least "arguably construing" the contract, we conclude that his decision on arbitrability draws its essence from the collective bargaining agreement.* Moreover, this Court has upheld arbitrator's rul-

*Since the arbitrator's interpretation of "occurrence" with respect to Furst's grievance effectively dissipates any timeliness of filing issue,

ings on much more attenuated grounds. *See Dixie Warehouse and Cartage Co. v. General Drivers, Warehousemen and Helpers, Local Union No. 89*, 898 F.2d 507 (6th Cir. 1990) (upholding arbitrator's ruling reinstating an employee who had been discharged for using alcohol while on duty despite employer's established policy of discharging employees who use alcohol while on duty since nothing in the collective bargaining agreement expressly limited or removed from the arbitrator the authority to review the remedy).

Not only do we conclude that the arbitrator was at least "arguably construing" the Agreement, we find that the arbitrator brought his "informed judgment to bear in order to reach a fair solution." *Misco*, 484 U.S. at 41 (citation omitted). This is not to say that an indefinite suspension may never be warranted when imposed, but rather that good cause for it may expire, as the arbitrator found in this case. The result sought by Interstate, as argued by the Union to the arbitrator, places Furst in a "twilight zone," both with and without a job, with no foreseeable means of escape.

II.

The second issue before us on appeal is whether the district court erred in concluding that the award requiring the reinstatement of Furst violated public policy. In *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983), the Supreme Court created a public policy exception to the finality of arbitration awards by holding that a court may not enforce a collective bargaining agreement that is contrary to public policy. *Id.* at 766.⁷ The Court stated that the question of public policy

we need not give further consideration to Interstate's argument that the language of the Agreement is indistinguishable from the relevant contractual language in *Moog*.

⁷This exception is essentially a specific application of the more general common law doctrine that a court may refuse to enforce contracts

is ultimately one for resolution by the courts. *Id.* It stressed, however, that a court's refusal to enforce an arbitrator's interpretation of such an agreement is limited to situations where the contract as interpreted would violate "some explicit public policy" that is "well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Id.* (internal quotations and citations omitted). In *Misco*, the Supreme Court revisited the public policy doctrine established in *W.R. Grace*. There the Court observed that its decision in *W.R. Grace* did not "otherwise sanction a broad judicial power to set aside arbitration awards as against public policy," 484 U.S. at 43, and stressed that "[a]t the very least, an alleged public policy must be properly framed under the approach set out in *W.R. Grace*, and the violation of such a policy must be clearly shown if an award is not to be enforced." *Id.*

In the instant case, in obiter dicta, the district court stated its belief that "this is a case where reinstatement would violate public policy of Ohio, Kentucky, and Indiana as expressed in their laws outlawing driving under the influence, as well as dealing in illegal mind-control substances." The district court also relied upon Furst's convictions for reckless driving and driving under the influence on two occasions. Interstate maintains on appeal that the reinstatement of Furst would violate the strong public policy against the operation of motor vehicles set forth by the legislatures of Ohio,⁸

that violate law or public policy. *W.R. Grace*, 461 U.S. at 766. In *Misco*, the Supreme Court noted that the doctrine is justified by the observation that "the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements." 484 U.S. at 42.

⁸The site of Interstate's main plant. See Ohio Rev. Code Ann. § 4511.19 (Anderson Supp. 1988) (providing that no person shall operate any vehicle while under the influence of alcohol or drugs); Ohio Rev. Code Ann. § 4507.08(A) (prohibiting the issuance of an operator's or chauffeur's license to a person who is an alcoholic or addicted to the use of controlled substances to the extent that the use constitutes an impairment of the person's ability to operate a motor vehicle safely).

Kentucky,⁹ and Indiana,¹⁰ against the operation of motor vehicles by persons under the influence of mind-altering substances.

Review of the district court's purported public policy justification for its decision to reverse reveals that it fails to satisfy the *Grace-Misco* standard. First, the *only* legal citation provided by the district court is an undifferentiated reference to *Misco*. The district court is therefore guilty of the very same conduct criticized by the Supreme Court in *Misco*; namely, the failure to review existing law and legal precedents in order to determine whether a "well defined and dominant" public policy has been violated by the reinstatement. Reversal is proper on this basis alone.

Second, as noted by the Union, the district court also mischaracterized the public policy issue. A careful reading of the district court's opinion reveals that it was in actuality evaluating Furst's behavior. The issue is not whether grievant's conduct for which he was disciplined violated some public policy or law, but rather whether the award requiring the reinstatement of a grievance, i.e. "the contract as interpreted," *W.R. Grace*, 461 U.S. at 766, violated some explicit public policy.

The district court failed to identify any law or legal precedent with which that arbitrator's reinstatement order would

⁹The site of Furst's arrest, the performance of the diversion agreement, and some of Furst's delivery routes before he was suspended. See Ky. Rev. Stat. Ann. 189A.010(1)(Miche 1989) (providing that no person shall operate a motor vehicle anywhere in the state while under the influence of alcohol or any other substance which may impair the ability to drive); Ky. Rev. Stat. Ann. § 186.440(4)(proscribing the granting of operator's licenses to habitual drunkards or drug addicts).

¹⁰The site of Furst's employment. See Ind. Code Ann. § 9-11-2-2 (Burns 1987)(classifying the operation of a motor vehicle while under the influence of alcohol or a controlled substance as a Class A misdemeanor); Ind. Code Ann. § 9-1-4-30(c) prohibiting the issuance of a driver's license to habitual drunkards and drug addicts).

conflict. While it is indisputable that allowing intoxicated persons to drive motor vehicles violates public policy, it does not follow, however, that any arbitration award reinstating an employee discharged for being intoxicated while off-duty, or arrested for off-duty possession of controlled substances may never be enforced without violating the public policy exception of arbitration awards.

Interstate relies principally upon two post-*Misco* decisions to support its argument that reinstatement of Furst would violate public policy, *Iowa Electric Light & Power Co. v. IBEW Local 204*, 834 F.2d 1424 (8th Cir. 1987); and *Delta Air Lines Inc. v. Airline Pilots Ass'n Int'l*, 861 F.2d 665 (11th Cir. 1988), *cert. denied* 110 S.Ct. 201 (1989). In *Iowa Electric*, the Eighth Circuit refused to reinstate a nuclear power plant employee who had deliberately compromised a reactor safety system, despite the arbitrator's finding that termination was too severe a sanction for the misconduct. 834 F.2d at 1426. The court found that that was a well-defined and dominant policy requiring strict adherence to nuclear safety rules. *Id.* at 1427. In *Delta*, the Eleventh Circuit affirmed the discharge of an airline pilot who operated an airplane while under the influence of alcohol. The Court, in applying *Misco*, noted that the illegal misconduct must be "integral to the performance of employment duties." *Id.* at 671. In addition, the court enumerated the laws and legal precedents violated by the pilot's actions. *Id.* at 672-74. Both cases are distinguishable from the instant case, however, since both involved on-duty misconduct and were found to violate well-defined and dominant laws and legal precedents.¹¹

¹¹In *Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173*, the Ninth Circuit criticized both *Iowa Electric* and *Delta* as being inconsistent with *Misco* and declined to follow them. 886 F.2d at 1215 (en banc)(holding that California's general interest in safe motor vehicles did not form explicit and dominant public policy that would bar reinstatement of a mechanic who committed a reckless act in the course of his employment). We need not address this schism, however, since we find a dispositive factual distinction.

In any event, the policies of the states involved do not attempt to prohibit driving by persons who have been convicted of either drunk driving or impaired driving because of drug use. Rather, these policies permit persons to drive under those circumstances where they have a driver's license. The states' well-defined policy is only to prohibit driving by those whose licenses have been revoked.

The district court failed to support its public policy dicta for a third reason. The district court based its decision to vacate Furst's reinstatement in part upon Furst's convictions for reckless driving and driving under the influence on two occasions.¹² The arbitrator, however, made note of these incidents but refused to consider the convictions on the grounds that they were too remote from the challenged suspension. It is clear from *Misco* that this Court may not review an arbitrator's judgment on procedural issues, such as the question of whether to admit evidence of later convictions, which grow out of the dispute and bear on its final disposition. *Misco*, 484 U.S. at 40 (citing *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964)). Nor is there any suggestion or hint in the record of "affirmative bad faith" or "gross misconduct" by the arbitrator in making this ruling. Further, as in *Misco*, we find that the district court engaged in impermissible fact finding in basing its decision to vacate Furst's reinstatement in part upon evidence excluded by the arbitrator; namely, Furst's conviction for reckless driving and driving under the influence. *See id.* at 44-45. Finally, to conclude from the fact that Furst had been indicted for possession of cocaine, marijuana and drug paraphernalia, that Furst had ever been or would be in the future under the influence of drugs or alcohol while driving a bread truck was also an exer-

¹²The parties brought these post-award convictions to the arbitrator's attention in their stipulations submitted to the arbitrator pursuant to the district court's remand order. Arbitrator's Supplemental Award at 2.

cise in factfinding, a function the district court was not authorized to perform. *Id.* (holding that assumed connection between the marijuana gleanings found in employee's car and employee's actual use of drugs in work place was tenuous at best and provided insufficient basis for holding that reinstatement would actually violate public policy).

In sum, we conclude that the district court erred in vacating the arbitration award. Accordingly, we REVERSE and REMAND with instructions to reinstate the arbitrator's award.

WELLFORD, Circuit Judge, concurring.

I reluctantly concur in the judgment to reverse the decision of the district court. I write separately to express concern that in this and in another recent case in our court arbitrators have seemed determined to counter employers' efforts to deal appropriately with employees who have used, or abused, alcohol or drugs in job-related situations. Here an employer was confronted with facts showing that one of its employees had a severe drug and/or alcohol problem. Realizing that this employee was operating its trucks on public roads and highways and was making deliveries to public facilities, including schools, Interstate Brands responsibly suspended the employee in an effort to prevent a disaster.

As a matter of public policy, I would amend the arbitrator's award to limit benefits to Furst up to the date on which he was found guilty by an Indiana court of alcohol-related driving offenses in 1986. As of that date it was clear that Furst's serious problem with alcohol and drugs was a continuing one, and Interstate Brands should no longer have been required to place itself and the public at risk by allowing Furst to operate its large vehicles on highways and in school yards.

The arbitrator's decision in this case goes to the limits of unusual interpretation of an agreement which seems clear and unequivocal on its face. Only because the Supreme Court, in *United Paperworkers v. Misco*, 484 U.S. 29 (1987), seems to tie the hands of the courts in reviewing enforcement of arbitration awards do I concur in this reversal of the district court. See also *Dixie Warehouse v. General Drivers, Warehousemen, Local Union No. 89*, 898 F.2d 507 (6th Cir. 1990) (an egregious result reinstating an employee drinking while on duty).

I also find the issues here extremely close with respect to the procedural aspect and deficiencies of the Union's claim on behalf of Furst. See *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); *General Drivers, Warehousemen, Local*

Union No. 89 v. Moog Louisville Warehouse, Inc., 852 F.2d 871 (6th Cir. 1988).

With strong reservations, then, I defer to a result which seems to be both illogical and potentially dangerous.

**ORDER OF UNITED STATES DISTRICT
COURT ON CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

(Filed March 8, 1989)

No. C-1-85-1251

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

**INTERSTATE BRANDS CORPORATION
BUTTERNUT BREAD DIVISION,
*Plaintiff,***

vs.

**CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN
AND HELPERS, LOCAL UNION NO. 135,
*Defendants.***

**ORDER ON CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

This matter is before the Court again on cross-motions for summary judgment relating to the arbitration award entered by Arthur R. Porter, Esq., on October 20, 1988, as supplemented by the parties' stipulation regarding the award (doc. 19). Before us are the plaintiff's supplemental memo in support of its motion for summary judgment (doc. 21), defendant's supplemental memo in support of its cross-motion and its response to plaintiff's supplemental memo (doc. 22), and plaintiff's reply in support of its motion (doc. 23).

In this case, plaintiff seeks to set aside an award of the arbitrator granting reinstatement and back pay to grievant, a bread truck driver, who had been arrested on his day off, in a non-company vehicle on a public highway while engaged in intravenous cocaine use. There was no doubt that the grievant habitually used cocaine, as he showed the arresting officer his needle-ridden arms and admitted to the same. The company suspended the grievant and, subsequently, a grievance was filed, but out of time. The arbitrator concluded that, although the grievance was filed out of time under the labor contract, if the imposition of the suspension was the alleged violation, there was a continuing violation of the agreement by the suspension which was subject to being grieved at any time. We noted (doc. 14) in our Opinion and Order denying the parties' original cross-motions for summary judgment:

The arbitrator concluded that the grievance was filed timely because the indefinite suspension was a continuing act subject to the grievance procedure. However, the grievant was too late to protest the initial act of suspension. On the merits, the arbitrator concluded that, although the company had the right to initially suspend the grievant pending investigation, the continuing indefinite suspension with impossible conditions was unreasonable and should cease. The company was ordered to pay back pay and benefits in an amount to be determined by the parties in negotiation. The arbitrator further provided that if the grievant violated the terms of his agreement with the Commonwealth of Kentucky, the company would retain the right to review the entire situation and take appropriate action.

We reviewed the arbitrator's original opinion and award and concluded that the case was not ripe for decision at that time, as the arbitrator had not fashioned

a final remedy. Thus, we remanded the case for a final decision. For a detailed history of the facts and procedural background of this proceeding, see our Opinion and Order denying the parties' cross-motions for summary judgment (doc. 14).

Subsequently, the defendant moved for partial summary judgment, seeking an Order for reinstatement pending a decision by the arbitrator on the unresolved back pay issue which had been remanded to the arbitrator. We again concluded that there was still no final award resolving all the issues in the case, and that, therefore, judicial review would be premature; we denied defendant's motion for partial summary judgment (doc. 18). This case is now ripe for decision on the parties' cross-motions for summary judgment as there now is a final award from the arbitrator upholding the grievance, ordering reinstatement, and awarding the parties' stipulated amount of back pay, \$70,684.51, less deductions required by law.

It is the plaintiff's position that the arbitrator has improperly disregarded the unambiguous language in the Collective Bargaining Agreement in order to find that the grievance was timely. The grievant was suspended on April 21, 1984. The Collective Bargaining Agreement mandated that a grievance shall be filed within fifteen days of its occurrence, but the grievance was not filed until June 8, 1984. The arbitrator concluded that although the grievant had waived his right to challenge the initial act of suspension by filing his grievance late, since the suspension was a continuing violation of the agreement, it was subject to be grieved at any time. Plaintiff argues that the continuing violation concept of the arbitrator flies in the face of the clear and unambiguous language of the agreement and, therefore, the arbitrator exceeded his authority.

The arbitrator is confined to the interpretation and application of the Collective Bargaining Agreement, and although he may construe ambiguous contract language, he is without authority to disregard or modify plain and unambiguous provisions.

Dobbs, Inc. v. Local No. 614, Int'l. Bro. of Teamsters, 813 F.2d 85, 86 (6th Cir. 1987) (quoting *Detroit Coil & Int'l. Assoc of Machinists & Aerospace Workers*, 594 F.2d 575, 579 (6th Cir.) cert. denied 444 U.S. 840 (1979)).

Defendant contends that the arbitrator's holding that the company's decision to place the grievant on an indefinite suspension rather than discharging him constituted a continuing act was a reasonable interpretation of the word "occurrence" found in the grievance procedure in the labor contract, and that this Court should not overturn that decision even though we may disagree with it. The company responds that such an interpretation would make every decision by the company which has a continuing effect, a continuing act and, thus, in most situations would result in permitting grievances to be filed at any time rather than within the chosen time limited for filing grievances as provided in the Collective Bargaining Agreement between the parties.

We are persuaded that being placed on suspension is an occurrence which required that it be grieved within the time limit provided in the grievance procedure of the labor contract. We find no ambiguity in the language of the agreement warranting the arbitrator's interpretation of "occurrence." Further, we see nothing unreasonable with the company's decision to suspend rather than discharge to give the employee an opportunity to rehabilitate himself through the diversion program and counseling. A suspension also permits the company to

determine whether he should be reinstated at a future time when he is no longer a threat to himself and other drivers on the road, nor likely to incur liability for his employer.

Having concluded that the grievance was not timely filed and that there was no ambiguity which would warrant an interpretation by the arbitrator of the terms of the labor contract, his award must be vacated and set aside.

As *obiter dicta*, we would further observe that reinstatement of the grievant violates a well-defined public policy against permitting habitual users of mind-altering illegal drugs from operating motor vehicles. The arbitrator's award puts at risk the public which the laws of Ohio, Kentucky, and Indiana have been designed to protect. The record before the arbitrator indicated that the grievant was arrested on April 11, 1984 for three separate crimes: possession of cocaine, possession of marijuana, and possession of drug paraphernalia in Kentucky. Because he successfully completed a diversion program on February 25, 1986, the criminal charges were dismissed. However, on September 5, 1986, the grievant was charged with driving under the influence and was found guilty of the reduced charge of reckless driving in Indiana, and on October 23, 1986, he was fined for speeding and for driving under the influence, and his driver's license was suspended. However, he was granted driving privileges to and from work and in connection with his employment activity. For these reasons, we believe that plaintiff's public policy argument is not specious, particularly where the grievant appears not to recognize the seriousness of his substance abuse and the danger to others. We believe this is a case where reinstatement would violate public policy of Ohio,

Kentucky, and Indiana as expressed in their laws outlawing driving under the influence, as well as dealing in illegal mind-control substances. *See Paperworkers v. Misco, Inc.*, 108 S.Ct. 364 (1987).

Accordingly, plaintiff's motion for summary judgment is granted. Defendant's cross-motion for summary judgment is denied. The arbitrator's award is hereby vacated.

SO ORDERED.

S. ARTHUR SPIEGEL
S. Arthur Spiegel
United States District Judge

**ORDER OF THE COURT OF APPEALS
FOR THE SIXTH CIRCUIT DENYING
PETITION FOR REHEARING**

(Filed September 11, 1990)

No. 89-3287

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

INTERSTATE BRANDS CORPORATION,
BUTTERNUT BREAD DIVISION,
Plaintiff-Appellee,

v.

CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN
AND HELPERS LOCAL UNION NO. 135,
Defendant-Appellant.

ORDER

BEFORE: KENNEDY, WELLFORD and SUHRHEINRICH*,
Circuit Judges.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having

* Hon. Richard F. Suhrheinrich was appointed to the United States Court of Appeals on July 10, 1990. Judge Suhrheinrich was a United States District Judge for the Eastern District of Michigan, sitting by designation, when this case was argued.

requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN pj
Clerk

ARBITRATOR'S AWARD

ARBITRATION

between

INTERSTATE BRANDS CORPORATION
BUTTERNUT BREAD DIVISION

and

CHAUFFERS, TEAMSTERS, WAREHOUSEMEN
AND HELPERS LOCAL UNION NO. 135

Issue

A grievance (jt 1) dated June 8, 1984 was filed by Randy Furst. It states that:

I am protesting the Company suspending me without just cause. The Company failed to comply with Article VI, Section 1, in that the Company failed to follow the proper procedure, i.e., "The employer shall not discharge or suspend any employee without just cause, but in respect to discharge or suspension shall give at least one (1) warning notice of the complaint against such employee to the employee, in writing, and a copy of the same to the Union". I am requesting that I be reinstated with full seniority and made whole for all back pay and benefits denied me.

The grievance and the responses by the company and union over the months that followed have led to the following two issues:

1. Is the grievance arbitrable?
2. Was there just cause for the suspension of grievant Randy Furst?

Background

A hearing was held by the arbitrator on February 26, 1984 at the offices of the company attorney in Cincinnati, Ohio. The company and union submitted to the arbitrator the testimony of the grievant and other witnesses, along with the joint and separate exhibits. The following persons represented the parties:

William R. Groth—attorney for the union
Fillenwarth, Dennerline, Groth & Baird
Indianapolis, Indiana

George E. Yund—attorney for the company
Frost & Jacobs
Cincinnati, Ohio

A transcript was made of the hearing. Post-hearing briefs were submitted by the company and union.

The company is a manufacturer and distributor of bread and bread related items. A plant is located in Cincinnati, Ohio, with distribution centers placed throughout the region. Distribution depots are found in Madison, and Versailles, Indiana. Grievant Randy Furst was assigned to work at Versailles and Madison, Indiana, although the specific incident that led to his suspension took place during the time of his work assignment to Madison.

Mr. Furst operated a step van about 20 feet long for the Madison depot. Drivers/salesmen wear Butternut uniforms; they are paid by a combination salary and commission. Drivers deliver bread and bread related products to stores, restaurants and schools on routes developed by the company and the particular driver/salesman.

Certain Facts Prior to and After the Suspension of Grievant

The arbitrator summarizes certain facts that led to the suspension of grievant Randy Furst, as follows:

1) Mr. Furst and a friend attended a baseball game of the Cincinnati Reds in Cincinnati, Ohio on April 11, 1984 (tr 128). Mr. Furst took a considerable amount of beer to the game (tr 129).

2) On the way home to Indiana from the game, Mr. Furst and his friend stopped on a road near the Cincinnati Airport (Ky. 20). Police officer David W. Brunning, who is an officer employed by the Kenton County Airport Authority, checked out the stopped vehicle.

3) Furst and his friend explained they had stopped to let the motor cool off, but officer Brunning testified that the motor was still running (tr 23).

4) Officer Brunning discovered Mr. Furst in a disoriented condition, speech slurred and with the smell of alcohol on his breath (tr 42).

5) Officer Brunning noted blood on grievant Furst's arm (tr 34). Mr. Furst told officer Brunning that he was in the process of shooting cocaine. He had pulled out a syringe and laid it on the floor (tr 35). Needle marks were all up and down both arms of the grievant (tr 35).

6) Cocaine, marijuana and drug paraphanalia were found in the van (tr 33, c 2). Mr. Furst was indicted in Kentucky for the possession of cocaine, marijuana and drug paraphanalia (tr 37, c 4).

7) Upon recommendation of officer Brunning, the court ordered the placement of grievant Randy Furst in a diversion program (tr 38, 39, u 2) which involves the following:

- a) Participation in a rehabilitation program
- b) Must be an outpatient or inpatient
- c) Stay out of trouble for one (1) year

- (d) If grievant does not agree or if he breaks agreement, Mr. Furst is subject to be tried on the charges
- e) Charges will not be dropped until the diversion program is completed

Company Position

The company was notified by a telephone call from someone that driver/salesman Randy Furst of Madison had been arrested for possession of drugs (tr 71). The company was told of the drug charge on April 13; it had occurred on April 11, 1984. Representatives of the company went to Madison on April 19th and confronted Mr. Furst with the charge. The grievant denied the whole thing (tr 74). Copies of the police report (c 1, c 3) were obtained on April 20. Mr. Furst still denied the account (tr 76). The grievant was suspended with the oral statement to Mr. Furst that the suspension would last:

... until this thing was dismissed proving his innocence (tr 76).

The suspension was for safety reasons. Mr. Furst operates a step van, his work is largely unsupervised. The company feared that drug responses could endanger the grievant and members of its public (tr 71). The company has never received any subsequent proof that Mr. Furst was innocent.

Former driver/salesman Randy Furst filed a grievance, which protests that suspension. This protest was filed some 48 days after the date of the suspension. The labor agreement states that grievances must be filed within fifteen (15) days (Article VII, sec. 3(a)):

The grievance shall be filed within fifteen (15) days of its occurrence, or the parties awareness thereof and shall be reduced to writing by the complainant.

In the event that such grievance is not submitted within this fifteen (15) day period, said grievance shall automatically be decided in favor of the defending party. In case of discharge the grievance shall be filed within five (5) days of its occurrence.

Forty-eight days is much in excess of the number of days specified in the contract. The grievance should be dismissed.

The union has claimed that the grievance is timely because there was no written notification of the suspension to Mr. Furst or the grievant. There was oral notice of the suspension to the grievant and the union (tr 76, 104, 112). The labor agreement does not require that a suspension be in writing. There is such a requirement for a written notice of discharge (Art. VI, sec. 1).

The union has also claimed that the contract requires a warning notification, prior to a suspension or discharge. Such a requirement is not applicable to suspensions or discharges for dishonesty, drunkenness, recklessness resulting in serious accident on duty or carrying unauthorized passengers. These are all major offenses. Clearly, possession and use of drugs falls within the categories of such a major offense. The company is not required to give a prior warning for all major offenses.

In conclusion, the grievance should be denied:

- 1) It is untimely
- 2) The company had just cause to be worried about the possible behavior of Mr. Furst as a driver/salesman. A suspension was warranted.

Union Position

The company failed to follow the terms of the labor agreement. Prior to a suspension or discharge the contract requires, through Article VI, section 1, that the company give at least one warning notice to the employee. Such a warning was not given. There are no remotely similar warnings, on the record of grievant Randy Furst.

At the time of the hearing, the company argued that drug activity was a major offense and could be classified with the other major offenses listed in Article VI, sec. 1 for which no prior warning is required. They are dishonesty, drunkenness, recklessness resulting in a serious on duty accident and the carrying of unauthorized passengers. No phrase is found in Article VI, sec. 1 which includes the words with a meaning "such as" or "for example". It is a list. Drunkenness is listed, not drug activity. The listing is clearly meant to apply to job related occurrences. General Manager Frederick Crofoot testified that a driver/salesman would not be discharged for a DWI conviction for activities outside normal working hours (tr 85-86).

The grievance is timely. The fifteen day time limit is found in Article VII, sec. 3(a). The grievance was filed on June 8, 1984. The grievance, however, is a continuing one. Mr. Furst has been placed on a type of indefinite suspension. The company has stated that the suspension would last until Mr. Furst is found to be innocent. Presumably, the company would convert the suspension into a discharge, if a court determined that the grievant was guilty.

The suspension has lasted for over one year. Under the diversion agreement, it will be another year before any final action of the court. Such a two or more year suspension for an activity which took place outside normal working hours, miles from the premises of the employer, without any publicity is not fair to the employee.

It should be noted that the company has used a double standard in making judgments. An employee convicted for DWI off the job would not even be suspended from work (tr 85-86). An inside plant employee accused of drug offenses, similar to those for Mr. Furst, would likely be returned to work after a suspension (tr 90).

The suspension is a continuing act. The grievance was filed protesting that act. It is timely even if the grievant was late in protesting the initial act of the suspension.

Grievant Randy Furst has been put in a twilight zone. He has a job but he does not have a job. Such a zone or place may have been appropriate for a short time. It is unjust for a two or more year period. Mr. Furst should be reinstated to his former position with full back pay and benefits.

Discussion

The arbitrator has considered carefully the various contentions of the parties submitted through exhibits, testimony and post-hearing briefs. Management and union emphasized several points of view in testimony that were not used by the respective attorneys in the post-hearing briefs. The arbitrator has summarized through sections in the Background, Company and

Union Position, the various points that seemed important in the determination of the company to suspend the grievant and in the union's willingness to protest the suspension.

There is little doubt that grievant Randy Furst did use cocaine on April 11, 1984. The testimony of officer Brunning, the police laboratory report, the report of the para-medic who checked Mr. Furst at the sight on April 11, and even the testimony of the grievant, confirm the use of cocaine. An initial suspension by the company, pending a more complete investigation, was warranted. A driver who uses illegal drugs is a possible danger to himself, the company and the general public. The company had the right to use the time to investigate to determine the degree of guilt, if any, and what action to take under the circumstances.

Deficiencies are evident in the procedures used by the company shortly before and after the initial suspension:

- 1) Management failed to put the suspension in writing. Such a *written* suspension is not necessary under the agreement, but it would have made for less confusion.
- 2) There was no limit set on the time for the suspension. The failure to put the suspension in writing made it easier to permit the time limits to drag on for many months. Management could have used time limits for review of "what to do next". Not even these limited time restrictions for review were used by the company.
- 3) The position of management that Mr. Furst had to demonstrate his innocence puts the employee in a difficult position. The case was under the jurisdiction of the Kentucky courts. Demonstrating or proving your innocence may be a difficult or impossible act for an individual employee.

4) No guidelines or policy was used by the company to judge off the premises, off hour activities by driver/salesman. The inplant policies are contradictory and confusing.

Management has said that drug use is a major "crime". It falls within the categories of actions that require no prior warning before suspension or discharge. As noted above, however, if an employee is *convicted* of "driving under the influence", that employee will not be affected on his job as long as he has a valid drivers license; his activities were off hours, off the premises and he is free to work. If the company is going to distinguish between drug and alcohol abuse, it has to make such distinction clear and be prepared to defend that distinction.

The company destroyed its agreement that the allegation of use of drugs was sufficient to permit an extended suspension, without time limit, by its policy to permit a convicted DWI employee the chance to return to work without any disciplinary action. Drugs and alcohol both influence driving behavior. The company has the right to be concerned about its public image, ability for driver/salesmen to sell and public safety on the highway. It must try for consistency, however, in the application of such a policy.

Finally, all of the above would be irrelevant if the grievance is treated as untimely. The arbitrator holds that the grievant did waive his right to challenge the initial suspension of April 11 by the long delay in filing his protest grievance. The suspension, however, as noted in the union post-hearing brief, is a continuing act. The arbitrator holds that such a continuing suspension can be protested by the grievance of June 8, 1984 (jt 2) even though that grievance emphasizes the act of suspension

rather than its continuing nature. It is unfair and unjust to require a driver/salesman to file a series of grievances protesting the continuing suspension. One is sufficient.

Award

The suspension should be ended for the grievant for the reasons outlined directly above. The parties should meet and determine the length of the suspension subject to the following conditions:

- 1) The company had the right to suspend the grievant on April 11, pending investigation.
- 2) The grievant and the union missed their rights to protest the initial suspension by the failure to file a grievance within fifteen days from April 11, 1984.
- 3) The grievance is a continuing grievance. It is properly before the arbitrator.
- 4) The grievant is subject to the terms of the diversion agreement as specified in union exhibit 2. If that agreement is broken, the company has the right to review the entire situation and take appropriate action.
- 5) The grievant is due appropriate back pay and benefits. The amount to be determined by the parties in negotiations.
- 6) If the disputes that may arise under 1 through 4 cannot be resolved by negotiation, the matter shall be returned to this arbitrator for appropriate resolution.

/s/ ARTHUR R. PORTER, JR.

Arthur R. Porter, Jr.

Arbitrator

— May 25, 1985

**ARBITRATOR'S SUPPLEMENTAL AWARD
REMAND OF AWARD BY UNITED STATES
DISTRICT COURT SOUTHERN DISTRICT OF
OHIO, WESTERN DIVISION**

ARBITRATION BETWEEN

**INTERSTATE BRANDS CORPORATION,
BUTTERNUT BREAD DIVISION
Cincinnati, Ohio (Madison, Indiana)**

and

**CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN
AND HELPERS LOCAL UNION NO. 135
FMCS: 85K/01426 Gr. No. 71167**

Background

Under date of May 25, 1985, the arbitrator issued an award in the above dispute. Subsequent to the award the following developments took place:

1. The Employer filed a Motion to Vacate the award issued in this case in U.S. District Court May 25, 1985, and the union filed a cross-claim for enforcement of the award. On November 25, 1986, Judge S. Arthur Spiegel of the United States District Court for the Southern District of Ohio issued the attached opinion and order denying both parties' motions.
2. Negotiations between the parties have failed to achieve a resolution of the issues raised by the arbitrator's award and the cross-motions to vacate and for enforcement.

3. Grievant Randy Furst ("Furst") successfully completed and did not violate the terms of the Diversion Agreement (Union Ex. 2). As a result, the criminal charges against him were dismissed. Successful completion of the Diversion Agreement occurred February 25, 1986, one year after such Agreement was entered by the Court.

4. The amount earned by employees working Furst's former position from June 8, 1984 (the date the grievance was filed) through December 31, 1987 (excluding twenty-two working days when Furst would not have been able to work due to the suspension of his drivers' license as described at paragraph 8 below) was \$84,087.53. The earnings from the route currently are \$493.00 per week on average.

5. Furst became regularly employed December 16, 1985 as a truck driver in Batesville, Indiana and has been employed continuously to the present time. Furst presently is earning \$32.00 per day. Furst's earnings for 1984, 1985, 1986 and 1987 totalled \$17,720.90, exclusive of earnings from his employment with Butternut in early 1984, and earnings during the suspension of his drivers license.

6. Despite efforts to find other employment, the diligence of which is not contested, Furst was employed between June 8, 1984 and December 16, 1985, and received during that period \$1,900.00 in unemployment benefits.

7. On September 5, 1986, Furst was charged with driving under the influence, and was found guilty of the reduced charge of reckless driving by the Batesville, Indiana City Court.

8. On October 23, 1986, Furst was fined \$72.00 for speeding, \$277.00 for driving under the influence, and his driver's license was suspended for thirty days and thereafter the suspension was

converted to a probationary driver's license, the probationary status of which is to terminate June 7, 1987. Under the terms of the probation, Furst is allowed driving privileges to and from work and in connection with employment activities during the day.

9. The Employer would be liable for pension contributions in accordance with the collective bargaining agreement between the parties for any weeks for which it is found that Furst should have been reinstated and could have been employed. The Health and Welfare Fund established by the collective bargaining agreement has not covered Furst during the period since his suspension, but coverage would have been available to Furst at the same premium rates and coverage level as though he had been employed if he had paid such premiums. He has incurred medical expenses which would have been covered had he remained employed. The Union contends the Employer is liable for health and welfare contributions in accordance with the collective bargaining agreement between the parties for any weeks for which it is found that Furst should have been reinstated and could have been employed. The Employer contends that for any weeks for which it is found that Furst should have been reinstated and could have been employed, it is liable only for the medical expenses Furst incurred which would have been paid under the terms of the health and welfare plan, up to a maximum equal to the cost to Furst of "covering" by paying the health and welfare plan premiums. The parties stipulate that the amount of Furst's medical expenses incurred to date is \$476.00.

10. The Employer and the Union reserve the right to request a hearing before the Arbitrator. Such request must be made in writing within ten (10) days after receipt of the opposite party's briefs. In the event no such hearing request is received by the Arbitrator, he may proceed to issue his supplemental Award.

The parties agree that the foregoing facts are uncontested, but do not necessarily agree that all such facts are relevant.

(Stipulation submitted by William R. Groth, Esq., attorney for the Union and George E. Yund, Esq., attorney for the Employer)

Under date of April 29, 1987, the parties had notified the arbitrator that any further proceedings in the dispute should be postponed; there was a possibility of a negotiated settlement.

The attempt to negotiate a settlement of the dispute did not succeed. The parties, under date of May 6, 1988, requested that the arbitrator issue, without further hearing, a supplemental decision in the dispute. Interstate Brands and the Teamsters Union agreed that procedure would be:

....the Employer will have until May 20 to postmark to you and Union counsel any brief it wishes to file in this matter, and that Union counsel will have fourteen (14) days thereafter to file a responsive brief....

(p 1 of May 6, 1988 letter from William R. Groth, attorney for Teamsters)

The arbitrator acknowledged, under date of June 25, 1988, receipt of the various joint and separate exhibits submitted by the parties. The arbitrator stated that the supplemental award would be issued on or before August 27, 1988.

Company Position

1. Grievant Randy Furst was properly suspended until the time that his diversion agreement expired, which was February 25, 1986. The matter of the arrest and subsequent determination of the use of drugs by the

grievant, was clearly brought out. The arbitrator found that Mr. Furst had been a user of drugs (Award, p. 5). Such use warranted the employer waiting until there was evidence that the treatment/diversion program had been effective. No back pay, therefore is due Mr. Furst prior to February 25, 1986.

2. Health and Welfare Benefit payments are not due to the Teamsters Union for the time for which Mr. Furst is due back pay. Article XXII of the labor agreement specifies that weekly premiums shall be paid into the welfare fund for medical insurance when an employee has been on the payroll for 30 days or more. Illness or off the job injury results in a cutoff of payments into the fund after four (4) weeks. On the job injuries result in the cessation of payments into the fund after twelve (12) months. If an employee is on leave of absence, payments will be made into the fund only if the employee makes advance payments to the employer.

These restrictions mean that when an employee is absent for treatment in a drug program, no such payments are due from the employer. In addition, the company and union had agreed that Mr. Furst could be covered by the fund, if he made contributions on his own. He failed to do so. The Health and Welfare Fund, therefore, has not been liable for any payments to Mr. Furst, with such payments to be reimbursed at the time of the back pay award.

3. The reinstatement of grievant Randy Furst would have been terminated by discharge in the fall of 1986, at the time of his arrest on two (2) occasions for DWI. The second of the arrests resulted in the 30 day suspension of the driver's license of Mr. Furst, during

which time he would not have been able to drive lawfully. The second of the two DWI incidents would have resulted in the discharge:

....at least by October 23, 1986, the second of the two incidents involving DWI (see, the Stipulation). (Company supplemental proceeding brief, p 8)

The grievant has domonstrated that he has not been able to control himself. He continues to use mind altering drugs. Alcohol is just as dangerous as other drugs. Discharge was warranted at least by October 23, 1986.

4. Reinstatement of grievant Randy Furst should be with the condition that any relapse, through the use of a mind altering substance, would mean immediate discharge. The danger to public safety is such that Mr. Furst cannot be trusted to remain "sober". Use of drugs and/or alcohol must mean discharge.

The company brief concluded that (p 11):

1. Furst should have been reinstated February 26, 1986.
2. Interstate Brands was entitled to discharge Furst October 23, 1986; and
3. Interstate Brands should pay Furst back pay for the period of February 26, 1986 through October 23, 1986, in the gross amount of \$11,322.00.

Union Position

1. The decision of the United States District Court, under date of November 25, 1986, was a limited one. The Court stated that the arbitrator should make a final award on the issues of reinstatement and back pay and benefits (Opinion, p 4). The Opinion and action of the Court did not ask the arbitrator to reinterpret the award

in light of the opinion; it did not ask the arbitrator to reevaluate the award. The arbitrator is required to decide the matter of reinstatement and back pay/benefits.

2. The arbitrator cannot order the discharge of Mr. Furst for the DWI convictions in the fall of 1986. These matters occurred *after* the end of the state of Kentucky Diversion program for Mr. Furst. The DWI affairs occurred long after the original acts of suspension.

No power has been given to the arbitrator to go beyond the original award and the remand by the Federal Court. The union strongly objects to any consideration of the DWI matters in the discipline issued to Mr Furst on or about April 11, 1984.

3. The back pay due to the grievant should be effective before February 26, 1986. That date was the end of the diversion program, which Mr. Furst completed successfully. The arbitrator held that the suspension should be ended for reasons outlined in the opinion (p 6). Appropriate action, which was permitted by the company, could be taken, *if* Mr. Furst did *not* complete successfully the mandated Kentucky diversion program. Mr. Furst completed the program, with no black marks against his record (Stipulation, #3). He should have been returned to work before February 26, 1986.

The arbitrator held that the indefinite suspension was not warranted. The company procedures in handling the suspension were criticized by the arbitrator. The date of the grievance, June 8, 1984, would be an appropriate back pay date for the grievant. That date would mean a suspension of about two months.

4. Payments should be made by the company to the Health and Welfare Fund in accordance with Article XXII. The company has acknowledged that payments are due to the pension fund. It argues, inconsistently,

that no such payments are due to the Health and Welfare Fund (medical payments). The award of the arbitrator holds that back pay and benefits were due. Health and Welfare Fund payments are a part of such benefits.

5. The company has attempted to insist on the opportunity for random testing of the grievant, if he should be returned to employment by the arbitrator's award. Such a permissive order is beyond the scope of the authority of the arbitrator (above, under #1 & 2). In addition, most arbitrators have rejected company attempts to introduce random testing for drugs and alcohol (cases cited in union brief, p 12).

The arbitrator should order the following:

1.the immediate unconditional reinstatement of the grievant.
2.the Employer to pay the grievant \$84,087.53 through December 31, 1987 and any additional back pay amounts accruing since January 1, 1988, less his interim earnings and unemployment compensation as set forth in the parties' stipulation;
3. Retain jurisdiction for an additional thirty (30) days after the issuance of the Supplemental Award to resolve any remaining disputes with respect to the precise amount of back pay owing.

Discussion

The dispute over the reinstatement of grievant Randy Furst was appealed by the company to the United States District Court. The District Court was asked by the company to vacate the arbitration award. The union filed a cross-motion for a summary judgment. The action of the District Court concluded that:

After reviewing the arbitrator's opinion and award and the briefs of the parties, we conclude that this case is not ripe for decision at this time. For the

reasons stated below, we find the arbitrator has not yet fashioned a final award and thus we remand this case for a final decision. . . .

Although reviewing courts, as a general rule, should vacate or enforce an arbitration award, it is proper to remand a case under appropriate circumstances. . . .

. . . . Because of the unspecific and contingent nature of the award, we find the arbitrator has not finally disposed of the issues in this case. . . .

We believe the interests of the parties would best be served if they determine whether the grievant successfully completed the terms of the diversion program, thus warranting consideration in determining whether and how much the grievant should be entitled to in back pay and reinstatement. If the parties cannot resolve the foregoing, the issues of reinstatement and back pay and benefits should be finally decided by the arbitrator. A final decision of this nature would be appropriate for this Court to review pursuant to 29 U.S.C. §185.

Accordingly, it is hereby Ordered that plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment be denied at this time and this case be remanded to the arbitrator for further decision in accordance with this opinion.

(Opinion of the Court pp 3,4,5.)

In order to implement the remand action of the Court, the arbitrator must review the matter of reinstatement, back pay and benefits, as if the request had come shortly after the issuance of the original opinion and award, dated May 25, 1985. For example, if the parties had negotiated promptly after May 25, 1985, on the terms of the award and failed to reach a settlement on reinstatement, back pay and benefits, two months might have passed. It is not appropriate for the

arbitrator to review the merits of the original decision, whether the grievant has various unresolved behavior problems or the severity/leniency of the May 25th action.

The implementation principle holds that the arbitrator cannot consider the actions of the grievant in regard to the DWI conviction in the fall of 1986. Such a DWI conviction occurred almost one and one-half (1½) years after the arbitration award and two and one-half (2½) years after the events that led to the challenged suspension.

Two matters might be mentioned in regard to the DWI arrest and evident conviction. The arbitrator found that company policy did not involve any penalty for a DWI conviction away from work (Opinion pp 5-6). Second, following the October 23 conviction for DWI, the driver's license of Mr. Furst was suspended for thirty (30) days. At the expiration of the thirty day period, Mr. Furst was allowed to drive to and from work and during working hours, during the day. The confused company policy on the results of the DWI convictions was not based upon any written or published rules, growing out of the terms of the labor agreement.

At this late date, it is difficult to pick a logical date for reinstatement of the grievant. The company brief (dated May 20, 1988) contends for February 26, 1986. This date is selected on the basis that it is a conclusion of the time set by the state court of Kentucky, during which time Mr. Furst had to remain free of drugs. The stipulation notes in item 3 that Mr. Furst successfully completed the diversion program. The arbitrator holds that it is improper to use the February 26, 1986 date as the reinstatement date. The suspension was carried out through poorly established procedures, as noted in the original arbitration opinion.

The union has opted for a reinstatement date of June 8, 1984, which was the date of the original grievance. That date is unreasonably lenient. The grievant engaged in conduct that cast serious doubt on his ability to work successfully for the company. Given the serious nature of the charges and the evidence against the grievant, the company had a right to suspend Mr. Furst for more than approximately two (2) months (April 11 to June 8, 1984). Delays in court actions and in the operation of the treatment program have created problems in the use of such dates as basing dates for reinstatement.

The arbitrator has selected a period of six months for the suspension, under the terms of the original arbitration award. Six months from the date of April 11, 1984 would be October 11, 1984. That date reflects the seriousness of the acts and the inadequate procedures used by the company in the handling of the entire matter.

Health and Welfare Benefits are due to be paid by the company, beginning with October 11, 1984, as if the grievant had been returned to his employment on that date. On October 11, 1984, the company presumably would have begun to make its regular contribution to the joint company-union plan, under the terms of Article XII of the labor agreement. The money evidently was not to be paid to the union; it was to be paid to a joint Health and Welfare Fund administered under the provision of the Taft-Hartley Act (union brief, p 6).

The issue is not the payment of the medical bills of Mr. Furst, which were relatively modest during the period(s) in question. The issue is the payment to the Fund, the protection of which was part of the benefits referred to or implied by the arbitrator's award of May 25, 1985.

The impact, if any, of the DWI conviction on the continued employment of the grievant has been discussed in the above paragraphs. If the company wishes to take any action regarding the DWI conviction, as isolated instances or as part of a claimed pattern of behavior, such action is possible. This action or actions must be filed as new charges, subject to the grievance procedure. The use of random drug/alcohol testing is not properly before the arbitrator, as part of this interpretation.

Finally, the arbitrator has no way of calculating the amount of money due under the terms of the award. The parties are given sixty (60) days after the date of this supplemental award to determine the amount of pay and benefits.

Supplemental Award

1. Resinstatement as of October 11, 1984.
2. Deduction for any wages paid by other employers during the time since October 11, 1984.
3. Deduction for any unemployment compensation paid subsequent to October 11, 1984.
4. Deductions for time lost during the time of the suspension of his driver's license. The period was twenty-two (22) days (Stipulation, item 4).
5. The company shall make the necessary payments for the days that count as time worked, to the Health and Welfare Fund, in accordance with the terms of the labor agreement.
6. The company and union have sixty (60) days from the date of this ruling to make the calculations, based upon the principles listed above. The matter shall be returned to the arbitrator for a determination of the amount due and only that amount, if the parties are not able to reach an agreement on the retroactive pay and benefits.

/s/ ARTHUR R. PORTER, JR.

Arthur R. Porter, Jr.

Arbitrator

August 20, 1988

COLLECTIVE BARGAINING AGREEMENT

VERSAILLES SALES DRIVERS #135

7/12/82—7/13/85

AGREEMENT

THIS AGREEMENT, dated August 25, 1982, by and between INTERSTATE BRANDS CORPORATION, Versailles and Madison, Indiana, or its successors (hereinafter referred to as the "Employer"), and CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 135 of Indianapolis, Indiana, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, or its successors (hereinafter referred to as the "Union").

WITNESSETH: It is hereby mutually agreed by and between the parties hereto as follows:

ARTICLE I
UNION RECOGNITION

Section 1. The Company agrees to recognize and does hereby recognize the Union, its agents, representatives, or successors, as the exclusive representative and collective bargaining agency for all of the employees of the Company as hereinafter defined:

Driver Salesmen, Sub-Drivers or Extra Men, Vacation Relief Men, Loader Shippers and Mechanics

Section 2. The Union realizes and fully recognizes its duty under the Labor-Management Relations Act of 1947, as amended, and, to the legal and actual extent that the Union is the exclusive collective bargaining representative and agent of all of the employees of the Company as hereinafter defined, the Union agrees to

recognize and does hereby recognize that it must and that it will represent all employees in the bargaining unit equally without discrimination irrespective of membership or non-membership in the Union.

Section 3. This Agreement shall be binding upon the parties hereto, their successors, administrators, executors and assigns. In the event an entire operation is sold, leased, transferred or taken over by sale, transfer, lease, assignment, receivership or bankruptcy proceeding, such operation shall continue to be subject to the terms and conditions of this Agreement for the life thereof. It is understood by this Section that the parties hereto shall not use any leasing device to a third party to evade this Contract. The Employer shall give notice of the existence of this Agreement to any purchaser, transferee, lessee, assignee, etc., of the operation covered by this Agreement or any part thereof. Such notice shall be in writing with a copy to the Union at the time the seller, transferee, or lessor executes a contract of transaction as herein described. In the event the Employer fails to give the notice herein required and fails to require the purchaser, the transferee, or lessee to assume the obligations of this Contract, the Employer shall be liable to the Union and to the employees covered for all damages sustained as a result of such failure to give notice of such failure to require assumption of the terms of this contract.

ARTICLE II UNION SHOP AND DUES

Section 1.(a) The Employer recognizes and acknowledges that Local Union 135 is the exclusive Union representative of all employees in the classifications of work covered by this Agreement for the purposes of collective bargaining as provided by the National Labor Relations Act.

(b) All present employees who are members of Local Union 135 on the effective date of this sub-section or on the date of execution of this Agreement, whichever is the later, shall remain members of the Local Union in good standing as a condition of employment. All present employees who are not members of Local Union 135 and all employees who are hired hereafter shall become and remain members in good standing of the Union as a condition of employment on and after the thirty-first (31st) day following the beginning of their employment or on and after the thirty-first (31st) day following the effective date of this subsection, whichever is the later. This provision shall be made and become effective as of such time as it may be made and becomes effective under the provisions of the National Labor Relations Act and under Indiana law, but not retroactively.

(c) When the Employer needs additional men he shall give the Local Union equal opportunity with all other sources to provide suitable applicants, but the Employer shall not be required to hire those referred by the Local Union.

(d) No provision of this Article shall apply in any state to the extent that it may be prohibited by state law. If under applicable state law additional requirements must be met before any such provision may become effective, such additional requirements shall first be met.

If an agency shop clause is permissible in any State where the other provisions of this Article cannot apply, the following Agency Clause shall prevail:

1. Membership in the Union is not compulsory, employees have the right to join, not join, maintain, or drop their membership in the Union, as they see fit. Neither party shall exert any pressure on nor discriminate against an employee as regards such matters.

2. Membership in the Union is separate, apart and distinct from the assumption by one of his equal obligation to the extent that he receives equal benefits. The Union is required under this Agreement to represent all of the employees in the bargaining unit fairly and equally without regard as to whether or not an employee is a member of the Union. The terms of this Agreement have been made for all employees in the bargaining unit and not only for members in the Union, and this Agreement has been executed by the Employer after it has satisfied itself that the Union is the choice of a majority of the employees in the bargaining unit.

Accordingly, it is fair that each employee in the bargaining unit pay his own way and assume his fair share of the obligation along with the grant of equal benefit contained in this Agreement.

3. In accordance with the policy set forth under sub-paragraphs (1) and (2) of this Section all employees shall as a condition of continued employment, pay to the Union, the employee's exclusive collective bargaining representative, an amount of money equal to that paid by other employees in the bargaining unit who are members of the Union, which shall be limited to an amount of money equal to the Union's regular and usual initiation fees, and its regular and usual dues. For existing employees, such payments shall commence thirty-one (31) days following the date of execution of this Agreement and for new employees, the payment shall start thirty-one (31) days following the date of employment.

(e) If any provision of this Article is invalid under the law of any state wherein this Contract is executed, such provision shall be modified to comply with requirements of State Law or shall be re-negotiated for the purpose

of adequate replacement. If such negotiations shall not result in mutually satisfactory agreement, either party shall be permitted all legal or economic recourse.

(f) Nothing contained in this Section shall be construed so as to require the Employer to violate any applicable law.

Section 2. A new employee shall work under the provisions of this Agreement but shall be employed only on a forty-five (45) day trial basis, during which period he may be discharged without further recourse; provided, however, that the Employer may not discharge or discipline for the purpose of evading this Agreement or discriminating against union members. After forty-five (45) days the employee shall be placed on the regular seniority list.

In case of discipline within the forty-five (45) day period, the Employer shall notify the Local Union in writing.

Section 3. The Company agrees to deduct each month, from the pay checks of all employees, who are covered by this Agreement, all periodic dues and initiation fees owing to the Union by the employees, provided, however, that an employee shall have signed and submitted a written authorization for such action on the part of the Company; such written authorization shall conform to and be in accordance with all applicable Federal and State Laws.

All monies deducted by the Company shall be forwarded to the President of the Union. It is understood and agreed that any monies collected by the Company for the Union will be taken out of the first (1st) pay period of each month for the following month and remitted to the Union by the 15th of the month. If after making deductions from the employee's pay checks for Union

Dues and/or initiation fees, the Employer fails to remit said monies to the Union within the period of time aforementioned, the Union shall have the right to take whatever legal and/or economic action, it will serve written notice upon the Employer at least 72 hours in advance of such action.

**ARTICLE III
STEWARDS**

Section 1. The Employer recognizes the right of the Union to designate job stewards and alternates from the Employer's seniority list.

The authority of job stewards and alternates so designated by the Union shall be limited to and shall not exceed, the following duties and activities:

1. The investigation and presentation of grievances with his Employer or the designated Company representative in accordance with the provisions of the collective bargaining agreement;
2. The collection of dues when authorized by appropriate Local Union action;
3. The transmission of such messages and information which shall originate with, and are authorized by the Local Union, or its officers, provided such messages and information
 - (a) have been reduced to writing, or
 - (b) if not reduced to writing, are of a routine nature and not involve work stoppages, slow downs, refusal to handle goods, or any other interferences with the Employer's business.

Job Stewards and alternates have no authority to take strike action, or any other action interrupting the Employer's business, except as authorized by official action of the Union.

The Employer recognizes these limitations upon the authority of job stewards and their alternates, and shall not hold the Union liable for any unauthorized acts.

The Employer in so recognizing such limitations shall have the authority to impose proper discipline, including discharge, in the event the shop steward has taken unauthorized strike action, slow down, or work stoppage in violation of this Agreement.

ARTICLE IV SENIORITY

Section 1. Seniority rights for employees shall prevail in the department that they are now working as of the signing of this Agreement.

Section 2. Before any change in the method of operation of the Employer is effectuated which may affect employees covered under this Agreement and where such proposed changes would introduce new job classifications or new type of equipment or would affect the wages, hours or working conditions or would result in a reduction of employment opportunity for employees covered by this Agreement, the Employer shall first notify the Union.

Section 3. When it becomes necessary to reduce the working force, the last man hired in his department shall be laid off first, and when the force is again increased, the men are to be returned to work in the reverse order in which they were laid off, provided skill and ability are equal.

Section 4. Any controversy over the seniority standing of any employee on the seniority list shall be submitted to the grievance procedure.

ARTICLE V MAINTENANCE OF STANDARDS

Section 1. The Employer agrees that all conditions of employment relating to wages, hours of work, overtime differentials and general working conditions shall be maintained at not less than the highest standards in effect at the time of the signing of this Agreement, and the conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement. It is agreed that the provisions of this Section shall not apply to inadvertent or bona fide errors made by the Employer or the Union in applying the terms and conditions of this Agreement if such error is corrected within ninety (90) days from the date of error.

Section 2. The Employer agrees not to enter into any agreement or contract with his employees, individually or collectively, which in any way conflicts with the terms and provisions of this Agreement. Any such agreement shall be null and void.

ARTICLE VI DISCHARGE OR SUSPENSION

Section 1. The Employer shall not discharge nor suspend any employee without just cause, but in respect to discharge or suspension shall give at least one (1) warning notice of the complaint against such employee to the employee, in writing, and a copy of the same to the Union, except that no warning notice need be given to an employee before he is discharged if the cause of

such discharge is dishonesty or drunkenness, or recklessness resulting in serious accident while on duty, or the carrying of unauthorized passengers. The warning notice as herein provided shall not remain in effect for a period of more than twelve (12) months from the date of said warning notice. Discharge must be by proper written notice to the employee and the Union. Any employee may request an investigation as to his discharge or suspension. Should such investigation prove that an injustice has been done an employee, he shall be reinstated. The Joint Committee shall have the authority to order full, partial or no compensation for the time lost. Appeal from discharge, suspension or warning notice must be taken within ten (10) days by written notice and a decision reached within thirty (30) days from the date of discharge, suspension or warning notice. If the employee involved is not within the home terminal area when the action of discharge, suspension or warning notice is taken, the ten (10) day period will start from the date of his return to the home terminal. If no decision has been rendered on the appeal within thirty (30) days the case shall then be taken up as provided for in the Grievance Procedure.

Section 2. The Union agrees that any member of the Union coming under the jurisdiction of this Agreement who wishes to quit his position must give the Employer one (1) week's notice of such intention.

ARTICLE VII *GRIEVANCE AND ARBITRATION PROCEDURE*

Section 1. The Company and the Union in the area incorporated by this Master Agreement shall together create a Joint Area Committee. The Joint Area Committee shall consist of an equal number appointed

by the Company and the Union, but not less than three (3) from each group. The Company and the Union may appoint an alternate for each of their respective representatives. The Joint Area Committee shall formulate rules of procedure to govern the conduct of its proceedings.

Section 2. The Joint Area Committee shall have jurisdiction over:

- (a) Disposition of grievance which cannot be settled at the Local Union and Management level.
- (b) Interpretation of the provisions of this Master Agreement.
- (c) Formulation of rules and regulations for the purpose of administering this Master Agreement and its Addenda(s).

Section 3. It is agreed by the parties that all disputes or grievances shall be settled in accordance with the procedure outlined as follows in this Article.

- (a) The grievance shall be filed within fifteen (15) days of its occurrence, or the parties awareness thereof and shall be reduced to writing by the complainant. In the event that such grievance is not submitted within this fifteen (15) day period, said grievance shall automatically be decided in favor of the defending party. In case of discharge the grievance shall be filed within five (5) days of its occurrence.
- (b) Any grievance shall first be acted upon by the Union Steward and by the local Plant Manager or his authorized representative.

- (c) In the event that the matter cannot be decided by the parties referred to above within a period of three (3) days after the filing thereof, it shall then become the duty of the local Plant Manager and the Business representative of the Local Union to meet and to earnestly endeavor to reach a satisfactory settlement of the matter within another period of three (3) days (this period may be extended by mutual agreement of these two parties in the event it seems advisable to do so.) It is agreed that any settlement reached by these two parties shall be final and binding on the local Union and the Company at the particular plant involved.
- (d) In the event that the Local Plant Manager and the business representative of the Local Union cannot reach an agreement after a three (3) day period of time and an earnest effort on their part, the grievance together with the positions of the respective parties, shall then be submitted in writing to the Joint Area Committee. Any decision reached by a majority of the members of the Joint Area Committee shall be final and binding on the parties.
- (e) In the event that the Joint Committee is unable to resolve the grievance and deadlocks, the grievance may be taken to arbitration by either party upon written notice to the other party given within ten (10) working days of the answer of the Joint Committee. In the event that such notice is given by either party, that party shall request the Federal Mediation and Conciliation Service to submit a list of five names of individuals who are available to act as arbitrators. If the parties are unable to agree upon one of the individuals so named, the parties shall strike names from the list until one (1) individual remains. The Federal Mediation and Conciliation Service shall then be requested to appoint

the remaining individual as arbitrator. The decision of the arbitrator shall be final and binding on both parties. The arbitrator's decision must be rendered as soon as reasonably possible. The expenses of the arbitrator shall be borne equally by the parties.

(f) The arbitrator may interpret the Agreement and apply it to the particular case presented, but the arbitrator shall have no authority to add to, subtract from, or in any way modify the terms of this Agreement or any agreement made supplementary hereto.

ARTICLE VIII
EXAMINATION AND IDENTIFICATION FEES

Physical, mental or other examinations required by a government body shall be promptly complied with by all employees, provided, however, the Employer shall pay for all such examinations.

ARTICLE IX
UNIFORMS

Section 1. If the Employer requires employees covered by this Agreement to wear uniforms, such wearing apparel as prescribed by the Employer shall be furnished without cost to the employee.

Section 2. Number of articles required shall be determined by the Employer.

Section 3. The employee shall be required to keep such wearing apparel neat and clean at all times.

Section 4. When an employee leaves the service of the Employer, he must return all such wearing apparel and any property of the Employer in his possession.

ARTICLE X
COMPENSATION CLAIMS

The Employer agrees to cooperate toward the prompt settlement of employee on-the-job injury claims when such claims are due and owing.

ARTICLE XI
MILITARY CLAUSE

Employees enlisting or entering the military or naval service of the United States, pursuant to the provisions of the Selective Service Act of 1948, shall be granted all rights and privileges provided by the Act.

ARTICLE XII
DEFECTIVE EQUIPMENT AND ACCIDENTS

Section 1. Employees covered by this Agreement shall be required to report immediately to their Employer in writing all defects of equipment and all accidents, together with the names and addresses of all witnesses to accidents.

Section 2. No employee shall be compelled to take out equipment that is not mechanically sound and properly equipped to conform with all applicable city, state and federal regulations.

ARTICLE XIII
OPEN ROUTES

(A) Route vacancies and newly established routes will be posted on the bulletin board for a period of three (3) working days. A sales representative who has six (6) months or more of continuous service with the company and who has not been a successful bidder within the

previous twenty-four (24) months shall be eligible to bid on such vacancy. The vacant route shall be awarded on the basis of qualification and length of service of those bidding on such vacant route. After the initial vacancy has been awarded, then that will create a second vacancy which shall also be posted for bid and such vacancy shall be awarded also on the basis of qualification and length of service of those bidding on such vacant route. The Company shall not be obligated to extend the bid procedure beyond the second vacancy.

(B) It is further agreed that the successful bidder has the opportunity to be on the route for a period of five (5) days to determine if the route is wanted. If said employee decides the route is not wanted, the employee may return to the former route and shall not be eligible to bid again for a period of twenty-four (24) months and such choice by the employee shall be construed as one bid for the principle of two (2) deep bidding.

(C) However, if the bid referred to in Section (B) above is an initial bid, then the Company shall award the route by seniority from among those route representatives remaining on the initial bid sheet and such employee shall also have the opportunity to be on the route for five (5) days to determine if the route is wanted. If the second route representative decides to accept the route or returns to the former route, then such employee shall not be eligible to bid again for twenty-four (24) months and the Company shall be relieved of its obligation to the bidding procedure in the principle of the two (2) deep bidding procedure.

(D) The posting of the bid shall contain the following information:

1. Route Number
2. Four (4) weeks previous sales on route
3. Notice if route will be cut within thirteen (13) weeks and approximately how much.

Failure to comply with the above shall subject the Employer to a guarantee for the period mentioned in 3 above.

All routes shall be posted within ten (10) working days of such vacancy. The employer shall forward to the Union and the steward a copy of the bid with a list of those bidding on the route and the successful bidder.

ARTICLE XIV CUTTING ROUTES AND TRANSFERS

It is agreed that when the Employer shall cut the route of any driver salesman, re-apportion the stops on his route, or transfers him to any other route resulting in a net loss in sales on his route, the driver salesman shall be compensated for such loss for a period of thirteen (13) normal weeks that he operates said route by additional compensation on the basis of eight percent (8%) commission on a fair estimate of the net loss in sales on his route made at the time of such cut, re-apportionment, or transfer, providing the driver salesman has been on such route for a period of at least thirteen (13) weeks.

ARTICLE XV CREDITS FOR RETURNS

No driver salesman shall be required to pay for any merchandise charged to him and brought back within the established code and credit for returns shall be given

daily. However, any driver salesman who orders and carries any item that is understood to be on a non-return basis shall stand the expense of any such returns.

ARTICLE XVI SALES MEETINGS

Section 1. The Employer agrees not to hold more than two (2) meetings in any one (1) month. Employees cannot be called by the Employer to attend a sales meeting on Sundays, Fridays, holidays or their days off.

Section 2. Where meetings are held out of town, the Employer agrees to furnish and pay for any necessary expenses involved. Whenever possible, forty-eight (48) hours notice shall be given in advance of such meetings.

ARTICLE XVII DEATH IN THE FAMILY

Section 1. In the event that a death in the immediate family of an employee requires his absence from work, the employee may be absent up to three (3) days without loss of pay for the regular work days on which he would have worked but for this absence. The amount of time taken off should be reasonably necessary under the circumstances, such as time required in order for the employee to arrange for and attend the funeral of the deceased. Immediate family shall mean: mother, father, sister, brother, husband, wife, child, mother-in-law or father-in-law.

Section 2. In order that there be no misunderstanding of the above clause:

- (a) Up to three (3) days without loss of pay means that the three (3) days is maximum.

- (b) If a burial takes place with one (1) working day lost, the Employer would grant one (1) day's pay. If two (2) days, then two (2) days pay, etc.
- (c) The Employer is not obligated to pay unless the employee attends the funeral.
- (d) The Employer's obligation ceases on the day of the funeral.
- (e) In case of death in his immediate family, the employee must notify his superior regarding funeral and whether he will attend. Employee must furnish Public Notice of death.

Section 3. Compensation for time off shall be paid on the following basis:

- (a) Commission Rated Employees: One-fifth (1/5th) of the base pay plus eight percent (8%) commission on net sales for each scheduled work day off.
- (b) Salary Rated Employee: One-fifth (1/5th) of weekly salary for each scheduled work day off.
- (c) Hourly Rated Employees: At the regular hourly rate for the number of hours normally scheduled to work on the scheduled work days the employee is off.

ARTICLE XVIII WAGES

Section 1. (a) The minimum wage scale for driver salesmen shall be as follows:

Effective July 12, 1982—\$165.00 per week, plus eight percent (8%) commission on net sales for days worked, with a minimum \$240.00 per week.

Effective July 10, 1983—\$172.50 per week, plus eight percent (8%) commission on net sales for days worked, with a minimum \$247.50 per week.

Effective July 8, 1984—\$182.50 per week, plus eight percent (8%) commission on net sales for days worked, with a minimum \$257.50 per week.

For the first thirty (30) days the minimum shall be \$175.00 per week effective July 12, 1982; \$190.00 per week effective July 10, 1983, and \$200 per week effective July 8, 1984, unless the salesman is responsible for the route. Effective August 25, 1982, when a new employee is then assigned the responsibility of the route, such driver salesman shall be paid 80% of the base pay plus commission for the first three (3) months on the route and 90% of the base pay plus commission for the second three (3) months on the route. Full base pay and commission to be paid after six (6) months on the route. This provision shall not apply to new hires with job experience and skills and abilities in the industry.

In the event of a driver salesman being off duty during the workweek, he shall be compensated for such partial workweek on the following basis:

One-fifth (1/5th) of the prevailing base for each day worked plus eight percent (8%) commission on net sales for days worked.

(b) The minimum wage scale for extra men shall be as follows:

Extra men shall be paid the route average of the depots in this contract while pulling vacation routes or handling other duties as assigned by management. However, when taking full charge of a route for an extended period (i.e. over two (2) weeks) for non-vacations, they shall be paid the rate for driver salesmen as stipulated above.

(c) The minimum wage scale for Loader Shippers shall be as follows:

Effective July 12, 1982, the Loader Shipper's rate will be \$7.37 per hour on a forty (40) hour week guarantee.

Effective July 10, 1983, the Loader Shipper's rate will be \$7.82 per hour on a forty (40) hour week guarantee.

Effective July 8, 1984, the Loader Shipper's rate will be \$8.27 per hour on a forty (40) hour week guarantee.

(d) The minimum wage scale for Mechanics shall be as follows:

Effective July 12, 1982, the Mechanic's rate will be \$8.11 per hour on a forty (40) hour week guarantee.

Effective July 10, 1983, the Mechanic's rate will be \$8.61 per hour on a forty (40) hour week guarantee.

Effective July 8, 1984, the Mechanic's rate will be \$9.11 per hour on a forty (40) hour week guarantee.

The standard guaranteed workweek shall be forty (40) hours per week, and the standard guaranteed work day shall be eight (8) hours per day.

All hours worked over forty (40) per week and eight (8) per day will be paid time and one-half.

In any week in which paid holidays fall, the guaranteed workweek shall be reduced by eight (8) hours for each such holidays falling within the scheduled workweek. All hours worked in excess of the hours in the workweek so reduced shall be paid at the rate of one and one-half times the regular rate, provided the holidays fall within the scheduled workweek.

Section 2. In the event a man in a lower classification performs work in a higher classification, he shall receive the pay for the higher classification for each hour he performs such work, but in no event shall a man in a higher classification suffer any reduction in his hourly rate when performing work in a lower classification.

Section 3. In case of layoffs, the last driver in their respective classifications shall be the first laid off.

Section 4. The Employer agrees that the aforementioned employees shall be paid weekly.

Section 5. Driver salesmen shall receive credit for all sales of bakery products to their customers by, or at, the bakery.

Section 6. No employees (herein classified) who are receiving a higher rate of pay than the rates specified above shall suffer any reduction in rate of pay during the life of this Agreement, provided that they continue on the same classifications or job.

ARTICLE XIX HOURS

Section 1. Sales Drivers' Workweek. Five days which need not be consecutive, shall constitute the workweek for all sales employees. The dropout day shall be determined by management and during any workweek in which a contract holiday occurs, such holiday shall be substituted for the dropout day. Management shall determine whether four or five days' delivery will be made during a particular holiday week.

Section 2. All driver salesmen shall report for work at a time agreed upon between the Employer and the driver salesmen according to the needs of the route.

Section 3. (a) Driver salesmen operating city grocery or restaurant bread routes shall be allowed a period of time not to exceed ten and one-half (10-1/2) hours from the time they report to work until they have completed all their duties and are free to leave the bakery. All such driver salesmen must be free to leave the bakery no later than 4:30 p.m. No driver under this classification shall work more than fifty-two (52) hours per week.

(b) Driver salesmen operating country grocery bread routes shall be allowed a period of time not to exceed eleven and one-half (11-1/2) hours from the time they report to work until they have completed all their duties and are free to leave the bakery. All such driver salesmen must be free to leave the bakery no later than 5:30 p.m. No driver under this classification shall work more than fifty-seven (57) hours per week.

(c) One (1) extra hour shall be permitted beyond the above stated time on Saturdays and days preceding holidays.

(d) Trucks shall be off the streets according to the following schedule: City bread trucks—3:30 p.m. on week days and 4:30 p.m. on Saturdays. Country bread trucks—4:30 p.m. on week days and 5:30 p.m. on Saturdays.

Section 4. It is agreed that all driver salesmen as soon as their routes are properly completed shall be allowed to drive in and settle their accounts without any unnecessary delay. Each salesman is to make one (1) trip on Wednesday of each week, except in holiday weeks. Upon completion of said trip to his regular customers, he shall return to the plant immediately and settle his accounts without any unnecessary delay. A setoff will not be considered a trip.

Section 5. The Employer agrees to pay the expenses of any employee required to stay out of town on a lay-over, expenses to consist of hotel room and meals.

Section 6. A uniform timekeeping system shall be used by the Employer to show properly and correctly the daily record of the working hours of each employee and such records shall be available for inspection by the Union representative upon request when necessary for settlement of a grievance. Such records shall be kept available for a period of sixty (60) days. The Union shall have the privilege of installing its own timekeeping system if the Employer's system is found unsatisfactory.

Section 7. The Employer and the Union jointly recognize that only through cooperation on the part of both parties will the hourly provisions in the agreement find satisfactory and equitable enforcement. To this end, both parties agree to support and carry out the following procedure:

(a) When the Union or the Employer has evidence that a sales driver is not complying with the hourly provisions in the contract, the Employer on his own initiative upon notice from the Union will see that a supervisor is promptly assigned to the route to ascertain whether or not it can be covered in the specified time.

(b) If the supervisor's report indicates the man can cover the route within the specified time, the sales driver will be given a warning that thereafter he must comply with the hourly provisions of the contract.

(c) If, subsequently, the same individual continues to violate the hourly provisions, the Employer will arrange with the Union representatives to meet in the Employer's office when the man has completed his route. If the results of this three (3) party meeting show the

delay to be inexcusable, the Employer will recommend, with the Union's approval, that the man be suspended without pay for three (3) days.

(d) If, as a result of the supervisor riding the route, it is ascertained that the route cannot be covered in the specified time, the Employer agrees to make proper adjustments in the number of stops to enable the route to be run within the specified time limits of the contract.

Section 8. (a) The Union agrees that a thirty (30) day period of time will be permitted new men from the date they assume responsibility of the route before they will be held liable under the above provision. The Employer agrees that he will not take unfair advantage of this grace period.

(b) Instances which are beyond the control of either the Company or the driver salesman and which are not to be construed as violations of the above provisions, shall be hazardous road conditions, detours, breakdowns, accidents, injuries or sudden illness.

Section 9. Any country route serving stops within the confines of the city will not be permitted to service such stops in any manner either through back calls, or the purpose of collections, leaving more merchandise or straightening up the products after 3:00 p.m. on any day of the week.

ARTICLE XX SUNDAYS AND HOLIDAYS

Section 1. No employee covered by this Agreement will be required to work, nor shall there be any deliveries on Sundays, or the following holidays: New Year's Day, Decoration Day, Independence Day, Labor Day, Thanksgiving Day or Christmas Day. This shall not

apply to delivery of restaurant merchandise by exclusive restaurant routes on either the first or second day of a double holiday when agreed upon by all parties.

Section 2. Any employee working on any of the above mentioned holidays, shall be compensated by being allowed a day off with pay within five (5) months after such holiday.

Section 3. All employees who have acquired one (1) year or more of service shall be entitled to a seventh holiday—their birthday. The employee may be given his birthday holiday two weeks prior to his birthday or two weeks after his birthday. If an employee's birthday falls on a scheduled day off in a regular workweek, he shall be given his birthday holiday on some other day.

Section 4. No employee covered by this Agreement shall suffer any loss of pay for the above mentioned holidays, provided they work the working day before and the working day following the holiday, unless such absence is due to sickness or for reasons deemed valid by the Employer.

Section 5. Effective July 12, 1982, Forty Dollars (\$40.00) shall be added to the respective base pay specified elsewhere in this Agreement in each of the named holiday weeks, provided the employees shall be required to work five (5) days in said holiday week.

Section 6. In the event, however, that the workweek shall be reduced to four (4) days in said week, then the aforementioned Forty Dollars (\$40.00) shall not be applicable.

ARTICLE XXI VACATIONS

Section 1. It is agreed by the Employer that all employees coming under this Agreement shall be eligible for vacations annually on the following basis:

- (a) Employees having one (1) year or more of continuous service as of their anniversary date of employment—one (1) week.
- (b) Employees having two (2) years or more of continuous service as of their anniversary date of employment—two (2) weeks.
- (c) Employees having five (5) years or more of continuous service as of their anniversary date of employment—three (3) weeks.
- (d) Employees having twelve (12) years or more of continuous service as of their anniversary date of employment—four (4) weeks.
- (e) Employees having twenty-five (25) years or more of continuous service as of their anniversary date of employment—five (5) weeks.

Section 2. Vacation periods shall be scheduled between January 1 and December 31.

Section 3. Employees are to select their vacations by order of seniority in their respective departments.

Section 4. Vacation pay shall be computed and paid on the basis of the average of the first four (4) weeks of the six (6) week period immediately preceding the employees vacation.

Section 5. It is agreed that compensation in lieu of vacation shall be granted to any eligible employee who leaves the employ of the Employer prior to receiving his

vacation in any calendar year, except for the following reasons: Discharge for dishonesty or intoxication.

This shall not apply to any employee whose vacation has been postponed at the request of the Employer.

Such compensation in lieu of vacation shall be computed on the following basis:

Driver Salesmen: The average earnings of their routes for the last four (4) full weeks preceding date of separation for the number of weeks vacation for which they are eligible.

Extra Men: At their average earnings for the four (4) full weeks preceding date of separation (or their minimum guarantee if earnings are less than guarantee) for the number of weeks vacation for which they are eligible.

Loader Shippers: At the average number of hours worked for the four (4) full weeks preceding date of separation at the regular hourly rate.

Mechanics: At the average number of hours worked for the four (4) full weeks preceding date of separation at the regular hourly rate.

Section 6. When a holiday, not required to be worked, falls within any employee's vacation period, such employee shall receive an extra day's vacation for each such holiday.

Section 7. Employees will not be called in to work during their vacation period except in cases of extreme emergency and when agreed to by the employee, provided that there is no one available who is qualified to perform the duties. It is also agreed in such cases any losses incurred by the men shall be paid by the Employer. Such losses shall consist of any non-redeemable advance payments for reservations.

Section 8. Vacations will be picked by seniority. Employees can pick all their vacation that they have coming for that year. Company to post vacation schedule and employees will pick their vacations in the months of January through April. Anyone who does not pick his vacation during this period of time, the Company will be allowed to give him his vacation at their convenience.

ARTICLE XXII
HEALTH AND WELFARE

Effective July 12, 1982, the Employer shall contribute to the Local 135 Welfare Fund, which is to be administered jointly by the parties, the sum of thirty-four dollars and fifty cents (\$34.50) per week for each employee covered by this Agreement who has been on the payroll thirty (30) days or more.

Effective July 10, 1983, such contributions shall be increased by three dollars (\$3.00) per week to the rate of thirty-seven dollars and fifty cents (\$37.50) per week.

Effective July 8, 1984, such contributions shall be increased by six dollars (\$6.00) per week to the rate of forty-three dollars and fifty cents (\$43.50) per week.

If an employee is absent because of illness or off-the-job injury and notifies the Employer of such absence, the Employer shall continue to make the required contributions for a period of four (4) weeks. If an employee is injured on the job, the Employer shall continue to pay the required contributions until such employee returns to work; however such contributions shall not be paid for a period of more than twelve (12) months. If an employee is granted a leave of absence, the Employer shall collect from said employee, prior to the leave of absence being effective sufficient monies to pay the required contributions into the Welfare Fund during the period of absence.

Contributions to the Health and Welfare Fund must be made for each week on each regular or extra employee even though such employee may work only part time under the provisions of this contract, including weeks where work is performed for the Employer but not under the provisions of this contract, and although contributions may be made for those weeks into some other health and welfare fund. Employees who work either temporarily or in cases of emergency under the terms of this Agreement shall not be covered by the provisions of this Article.

Action for delinquent contributions may be instituted by either the Local Union or the Trustees. Employers who are delinquent must also pay all attorney's fees and costs of collections.

Notwithstanding anything herein contained, it is agreed that in the event any Employer is delinquent at the end of a period in the payment of his contribution to the Health and Welfare Fund created under this Agreement, in accordance with the rules and regulations of the Trustees of such Fund, after the proper official of the Local Union has given seventy-two (72) hours notice to the Employer of such delinquency in Health and Welfare payments, the Local Union or Area Conference shall have the right to take such action as they deem necessary until such delinquent payments are made, and it is further agreed that in the event such action is taken, the Employer shall be responsible to the employees for losses resulting therefrom.

By the execution of this Agreement the Employer authorizes the Employers who are signatories to collective bargaining agreements signed with Local 135 to enter into appropriate trust agreements necessary for the administration of such fund, and to designate the

Employer trustee under such trust agreements, hereby waiving all notice thereof and ratifying all actions taken or to be taken by such trustees within the scope of their authority.

ARTICLE XVIII PENSION PLAN

Section 1. The Employer shall contribute to the Central States, Southeast and Southwest Areas Pension Fund the sum of thirty-seven dollars (\$37.00) per week for each employee covered by this Agreement who has been on the payroll thirty (30) days or more.

Section 2. There shall be no other pension fund under this contract for operations under this contract or for operations under the Southeast and Southwest Areas contracts to which Employers who are party to this contract are also parties.

Section 3. By the execution of this Agreement, the Employer authorizes the Employers' Associations which are parties hereto to enter into appropriate trust agreements necessary for the administration of such Fund, and to designate the Employer Trustees under such agreement, hereby waiving all notice thereof and ratifying all actions already taken or to be taken by such Trustees within the scope of their authority.

Section 4. If an employee is absent because of illness or off-the-job injury and notifies the Employer of such absence, the Employer shall continue to make the required contributions for a period of four (4) weeks. If an employee is injured on the job, the Employer shall continue to pay the required contributions until such employee returns to work; however, such contributions shall not be paid for a period of more than six (6)

months. If an employee is granted a leave of absence, the Employer shall collect from said employee, prior to the leave of absence being effective, sufficient monies to pay the required contributions into the Pension Fund during the period of absence.

Section 5. There shall be no deduction from equipment rental of owner-operators by virtue of the contributions made to the Pension Fund, regardless of whether the equipment rental is at the minimum rate or more, and regardless of the manner of computation of owner-driver compensation.

Section 6. Contributions to the Pension Fund must be made for each week on each regular or extra employee, even though such employee may work only part time under the provisions of this contract, including weeks where work is performed for the Employer but not under the provisions of this contract, and although contributions may be made for those weeks into some other pension fund. Employees who work either temporarily or in cases of emergency under the terms of this contract shall not be covered by the provisions of this paragraph.

ARTICLE XXIV SEPARABILITY AND SAVINGS CLAUSE

Section 1. If any Article or Section of this contract or of any riders thereto should be held invalid by operation of law or by any tribunal of competent jurisdiction, or if compliance with or enforcement of any Article or Section should be restrained by such tribunal pending a final determination as to its validity, the remainder of this contract and of any rider thereto, or the application of such Article or Section to persons or circumstances other

than those as to which it has been held invalid as to which compliance with or enforcement of has been restrained shall not be affected thereby.

Section 2. In the event that any Article or Section is held invalid or enforcement of or compliance with which has been restrained, as above set forth, the parties affected thereby shall enter into immediate collective bargaining negotiations upon the request of the Union, for the purpose of arriving at a mutually satisfactory replacement for such Article or Section during the period of invalidity or restraint. If the parties do not agree on a mutually satisfactory replacement, either party shall be permitted all legal or economic recourse in support of its demands notwithstanding any provision in this contract to the contrary.

ARTICLE XXV *INSPECTION PRIVILEGES*

The authorized Business Agent of Local Union No. 1335 shall have access to the Employer's establishment during working hours for the purpose of adjusting disputes, investigating working conditions and ascertaining that the Agreement is being adhered hereto, provided he advises management of the purpose of his visit.

ARTICLE XXVI *PRIVATE AND SECONDARY LABEL*

Section 1. Private label and/or secondary merchandise delivered by route salesmen shall be at a commission rate of 6% on all such merchandise sold payable to the driver salesman making such sales and deliveries, on a weekly basis, provided the driver salesman is required to service the rack and pick up stale. Sales of such

merchandise shall be separately accounted for and shall not be included with regular sales of primary merchandise in determining the commissions payable.

Section 2. Private label and/or secondary merchandise delivered by route salesmen shall be at a commission rate of 4% on all such merchandise sold payable to the driver salesman making such sales and deliveries on a weekly basis provided the driver salesman is not required to service the rack or pick up stale. Sales of such merchandise shall be separately accounted for and shall not be included with regular sales of primary merchandise in determining the commission payable.

Section 3. No commission shall be paid on any merchandise delivered to a stop by hourly paid drivers or on merchandise picked up f.o.b. at the plant or a plant warehouse. Commissions will be paid, however, on deliveries of premium merchandise made to stores by special delivery drivers when in the opinion of management the store had been properly serviced by the regular driver salesman and the special delivery was necessary because of unforeseen circumstances.

Section 4. If the employer has reasonable proof that a customer is seeking or negotiating a different method of distribution or compensation from another supplier, the Company shall inform the Union and the two parties shall have an immediate meeting so as to allow the Company to compete on equal terms and conditions.

ARTICLE XXVII PROTECTION OF RIGHTS

Section 1. Picket Line It shall not be a violation of this Agreement, and shall not be cause for discharge or disciplinary action, in the event an employee refuses to enter upon any property involved in a lawful primary

labor dispute or refuses to go through or work behind any lawful primary picket lines including the lawful primary picket line of Unions party to this Agreement and including lawful primary picket lines at the Employers places of business.

Section 2. Struck Goods It shall not be a violation of this Agreement and it shall not be cause for discharge or disciplinary action if any employee refuses to perform any service which his employer performs by arrangement with an employer or person whose employees are on strike, and which service, but for such strike, would be performed by the employees of the Employer or persons on strike.

Section 3. Grievances Within five (5) working days of filing of grievance claiming violation of this Article, the parties to this Agreement shall proceed to the final Step of the Grievance Procedure, without taking any intermediate Steps, any other provision of this Agreement to the contrary notwithstanding.

ARTICLE XXVIII TERMS OF AGREEMENT

This Agreement shall become effective as of July 12, 1982, and shall remain in full force and effect until July 13, 1985, and thereafter until a new Agreement has been consummated and signed, or this Agreement, after the above mentioned expiration date has, upon sixty (60) days written notice, been cancelled or terminated by the Employer or the Union.

IN WITNESS THEREOF, the parties hereto have caused their names to be subscribed to duplicates hereof, by their officers duly authorized so to do.

The Post Office address of the Union is 1233 Shelby Street, Indianapolis, Indiana 46203.

The Post Office address of the Company is 747 W. Fifth Street, Cincinnati, Ohio 45203.

FOR THE UNION

FOR THE EMPLOYER

TEAMSTER

LOCAL

UNION

INTERSTATE BRANDS
CORPORATION

NO. 135

By _____ By _____

By _____ By _____

LETTER OF AGREEMENT

The Company and the Union agree that on all accidents pertaining to the Interstate Brands Plant in Versailles, Indiana, the Union and Company agree to waive all time limits under Article 6, Discharge or Suspension, and Article 7, Grievance and Arbitration Procedure until a decision is reached by the National Safety Committee in regards to whether the accident that an employee had at Versailles was chargeable or non-chargeable.

After the decision is reached and the employee still feels that the suspension or letter is unwarranted, at that time he may proceed to the above named Articles and all grievances will be processed in accordance.

GRIEVANCE

71167
E.I. 1-26-61
Nº
GRIEVANCE
CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN AND HELPERS
LOCAL UNION NO. 135

Done Filled	7/10/98	1998	
Phone	815-685-0333		
Address	811 E. Box 57		
City	Holton	State	IN
Employed by	Interstate Brands (Burrerrie Record)	ZIP Code	47240
Job Classification	Customer Sales Representative	Date Employed	
<p>State the nature of the grievance, including date, names and places. Specify contract violation by Article and Section number. In order to assist in the processing of this grievance, the grievant agrees to furnish evidence, witnesses, and documentation in support of this grievance.</p>			
Contract Violation Article	VI	Section	1

GRIEVANCE I am objecting the Company suspending or without just cause. The Company failed to comply with Article VI, Section 1, in that the Company failed to follow the proper procedure, i.e., "The employer shall not discharge or suspend any employee without just cause, but in respect to discharge or suspension shall give at least one (1) warning notice of the complaint against the employee to the employee, in writing, and a copy of the same to the union. I am requesting that I be reinstated with full seniority and made whole for all back pay and benefits denied me.

I understand and agree that the Local Union has the final authority in processing, presenting, and adjusting any grievance complaint or dispute in a manner that the Local Union or its officers and business representatives consider to be in the best interest of the Local Union. I also understand and agree that the Local Union and its officers and business representatives may decide to process a grievance, dispute or complaint if a local and

STEWARDS SIGNATURE John T. Stewart John T. Stewart
RECEIVED John T. Stewart John T. Stewart

Date received by Standard 6-8-64 Standard's Meeting date with Company

COMPANY POSITION

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[REMOVE AN ENTIRE SET OF GUARANTEE FORMS (WHITE, YELLOW, PINE)
FROM PAD BEFORE PILING OUT GUARANTEE.]

[1] PORTIONS OF TRANSCRIPT OF PROCEEDINGS
BEFORE THE ARBITRATOR
ARBITRATION

INTERSTATE BRANDS CORPORATION,
Butternut Bread Division

FMCS No. 85 K/01426

Teamsters 135

Grievance of Randy Gene Furst

GRIEVANCE NO. 71167

TRANSCRIPT OF PROCEEDINGS

The above-entitled cause came on for Arbitration before Arthur Porter, Jr., at the offices of Frost & Jacobs, 2500 Central Trust Center, on Tuesday, February 26, 1985, at 10 o'clock a.m.

[2333] WITNESS BUNNING:

smoke coming from the area of Hunter Lane which is a side street that runs north and south off of Kentucky 20. I proceeded down to see where the smoke was coming

from because we have had several house fires and burglaries in the area. Boone County along with the Kenton County police have asked to us to.

I passed a 1975 Dodge van with Indiana plates on it in route there. I saw that there was no emergency, it was just somebody burning some trash back in the area which is not unusual, so I turned around, came back to the van again, pulled up behind him and called the license number into my dispatcher for a plate run.

I approached the van and a man who identified himself as a Mark Meisberger, I think his name was. He told me they were having—the van was overheating and they had pulled off on the side road so the van would cool off. Well, as I was standing there talking to him I noticed the van was still running. I asked if the owner of the van was present and he said yes, he was in the passenger seat. I asked Mr. Meisberger again if he would get the license of the owner so I could see who he was. He said yes, he would. He went up to the van, talked to the passenger for a second. In the meantime, I went around to the passenger side of the door. I again asked Mr. Furst for his identification; he said he had [24] just given them to the other subject. He was at a higher level than I was so I felt at a disadvantage because I could not see his hand or what he was doing, so I asked him if he would open the door which he agreed to do so.

While I was talking with Mr. Furst I noticed a white powder substance laying on the motor cover which was in a plastic baggie with aluminum foil. I reached in, picked up the substance, I asked Mr. Furst what it was. At that time he leaned out of the van, grabbed it out of my hand and threw it through the van out the driver's door. I backed up approximately two steps, drew my service revolver, and asked, or I should say told, Mr.

Furst to exit the van along with Mr. Meisberger and placed them both face down in the grass area where I called for an assistance from one of our other units.

Q. Did you recover the items that he had thrown?

A. Yes, I did. I found the item on the street, recovered it along with several other items that were in the van.

Q. Now, I would like to have this document marked for identification as Company Exhibit 1.

(Thereupon, Company Exhibit 1 was marked for purposes of identification.)

THE ARBITRATOR: I might say that my policy in [25] an arbitration hearing is to permit each party to, as I indicated in the general way, proceed pretty much as they wish with exhibits, testimony, the opposite party having the right to make objections and the objection and the details for the objection would be part of the record but the exhibit would be entered as part of an ongoing support or lack of it as the case may be for the particular case, in this case the company. So this would be Company 1 and it is admitted.

MR. YUND: Okay.

THE ARBITRATOR: I don't think we have to go through—

MR. YUND: No need to move to admit?

THE ARBITRATOR: No, no need to move to admit unless the parties want to have that formality.

Q. Officer Bunning—I will be happy to show him mine, Mr. Arbitrator. It's the first time you have seen it.

I am handing you a copy of the document that was marked for identification which is Company Exhibit 1 and ask if you can identify that for us, please?

A. Yes, sir. This is a copy of the arrest report that I made on the 11th of April.

MR. YUND: Can we go off the record for [26] just—

THE ARBITRATOR: Yes, sir.

(Off-the-record discussion.)

Q. Okay. Officer Bunning, had you concluded with your identification of Company Exhibit 1?

A. Yes.

Q. What happened—well, first of all, did you bring with you today pursuant to a subpoena that was issued to you your file in this case?

A. Yes, I have.

Q. And that's the police department's file?

A. Yes, it is.

Q. Did you also bring with you the items that you took from or found in Randy Furst's van on April 11, 1984?

A. Yes.

Q. Would you show the items of evidence that you took from the van?

A. Yes, I will. This may take a minute to get open.

This item here, cellophane, there was two of them in the van. One of them he threw out the side door, the driver's door, which was in plastic which had a white powder substance in it. There is still some residue in here, as you can see.

[27] Q. Okay. Would you describe, as you remove them from the packet, the items that you brought with you so that the court reporter can get all of these in writing?

A. These items here, this plastic baggie had the aluminum foil inside it. It was on the motor cover when he threw it out the door. These here appear to be from the lab from where they took the substance out of here and put them into paper so they would not lose it. This is an extracted sample from this which the lab had run a test on at the Northern Kentucky Crime Lab.

This is a bottle of what turned out to be plain water which was found in Mr. Furst's van which he—after reading him his Miranda warning, he said he had mixed the cocaine into a water solution. This syringe was found laying beside Mr. Furst's seat, passenger seat, which he admitted to having tried to inject the solution to his arm. He had drawn the blood out and was getting ready to inject the solution back into his arm when he was interrupted by myself.

Q. I am sorry, is that something that he told you at the time?

A. Yes, it is. This is just an extracted sample from the syringe itself.

Q. Go ahead and take your time and reassemble all [28] of that unless the Arbitrator or Bill, do you want to examine it? I just don't want him to lose anything.

MR. GROTH: Are you going to make these exhibits?

MR. YUND: No, I'm not going to make them. I am planning on making the crime laboratory examination of those exhibits. I don't think I have any authority to make those exhibits and take them from the possession of the Kenton County Airport Board Police.

A. This is a bag, approximately one ounce, of green, brownish green substance that was laying beside the seat which turned out to be marijuana along with one marijuana cigarette that was also found in the bag or in the van itself.

MR. GROTH: Mr. Arbitrator, this is not, of course, a criminal proceeding, and the state of Kentucky is not here nor its prosecutor, and I understand the rules of procedure and the Fourth Amendment and things like that don't necessarily

apply here and I don't intend to make it a criminal trial; I don't think that's what it is or what it should be, but I would note, and I would like it noted on the record, that when the officer, of [29] course, indicates that this substance is marijuana, this substance is something else, I have no independent means of verifying the truth of that assertion. There is no chemist here or no person from the lab who is prepared to testify that he did an analysis of the substance and this is what he found.

Therefore, I can't cross-examine this witness because apparently he did not conduct the test. So rather than me making an objection each time there might be a possible irregularity under the criminal rules or under criminal trial procedure, I would simply like to note for the record that we are operating fairly informally here and that I might have objections were this a criminal trial; that I am basically asking for a standing objection in these proceedings.

MR. YUND: In response—

THE ARBITRATOR: Do you want to respond? My ruling will be to admit with the objections by counsel noted and the response by company counsel.

MR. YUND: Yes, sir. With that in mind, if we could be indulged a moment longer, I do have a copy of the report of the crime laboratory examination [30] which is, of course, made a part of the police department's file and under my rules of evidence would be regarded with the kind of exception to the hearsay rule that I think this objection addresses were we in a criminal courtroom.

A thought just occurred to me. Now, it might help to make the record more complete if we could have a stipulation that I could have photographs

taken of these exhibits and have those photographs entered into the record. Would there be any problem with that, and if there is a problem with that, Mr. Groth, then I will make a formal motion to the Arbitrator and let him rule on whether or not he will accept such photographic, not photographs of anything in addition to what we have here, just photographs of what we have here today.

MR. GROTH: Do whatever you want to do as far as that goes. If you want to take photographs, that's fine or perhaps the Arbitrator would want to indicate whether photographs are even necessary in this case.

THE ARBITRATOR: I don't think photographs are necessary at this point.

MR. YUND: Okay.

[31] THE ARBITRATOR: But I think the objections and responses and so on should be as part of the record because it was raised and the guidelines I laid down initially before the hearing began, this type of evidence is admissible as part of the informal arbitration proceeding because this is not a criminal proceeding and consequently, it is admissible for what it's worth, and I don't mean to downgrade it at this point, and the evaluation of its validity has to wait until further testimony today and arguments are submitted by the parties later and so forth.

So why don't we proceed at this point, Mr. Yund.

Q. Officer Bunning, would you continue with what you found in the van?

A. On a further search of the van it also revealed what appeared to be a common table, large table spoon with a cotton ball in it and residue around it which Mr.

Furst admitted that he had used mixing water and cocaine together in the van to heat it prior to injection.

There is a medical pair of scissors, I can't think of the proper term that people use, for smoking marijuana. When the joint gets too small to hold, they clamp this around the marijuana cigarette.

[32] Q. Are those called forceps, Officer Bunning?

A. They may be. I'm not positive on it. There were several—three packs of cigarette papers, those are commonly used for smoking mairjuana that most kids will use. They can be bought anywhere, any store in the area usually sells them.

There was another pack of approximately eight syringes that was also found in the van at the time of the arrest. That's everything I found in the van at the time.

Q. Were these items that you have just identified for the record that you have said you took from the van, were they submitted to a laboratory for analysis?

A. The drugs themselves, yes, they were.

Q. Okay.

MR. YUND: I would like this marked. I believe we are on Company 2.

(Thereupon, Company Exhibit 2 was marked for purposes of identification.)

Q. Officer Bunning, may I have that back for a moment? Let me mark it.

Officer Bunning, I am handing you a copy of the document that's been marked for identification as Company Exhibit 2 and ask if you have ever seen that before?

A. Yes, sir. It's a copy of the original report [33] from the Northern Kentucky State Crime lab which is located in Highland Heights, Kentucky adjacent to Northern Kentucky University.

Q. And was this report submitted to you after it was prepared?

A. Yes, sir, it was submitted to me.

Q. And was either the original or a copy placed in your department's file on this matter?

A. Yes, it was.

Q. And will you tell us, using the benefit of your experience in these matters, what that report reveals about the contents of the van?

A. Okay. The report shows that Exhibit 1 which was the—

MR. GROTH: I think that the report speaks for itself, Mr. Arbitrator. I haven't raised an objection to this and I don't know why further testimony needs to be added to elaborate that report. It seems to me to be quite complete.

THE ARBITRATOR: Do we need to go down into the gory details of the plastic bag?

MR. YUND: I was anticipating perhaps an objection by counsel, so I don't think that we need to if he doesn't.

[34] THE ARBITRATOR: I can read and so forth.

MR. YUND: Yes, sir. That's fine. No need for that testimony regarding the contents of that exhibit.

Q. Okay. Officer Bunning, I think we have covered what you got from the van. Now, taking you back to the point in your story where you had drawn on the individuals, what did you do with them next?

A. Like I said, I asked Mr. Furst to exit the van and placed Mr. Furst and Mr. Meisberger both face down into the grass while I called for an assistance unit, a back-up unit to my location which was a supervisor at the time, Lieutenant Watts.

After his arrival both of us searched and handcuffed Mr. Meisberger ad Mr. Furst and placed them in the cruiser. We went back and searched the van and we found the rest of these drug items and drug paraphernalia. From there they were taken back to our headquarters for processing and prior to processing I read both Mr. Furst and Mr. Meisberger their Miranda warnings and I had asked—I noticed at the time Mr. Furst had some blood on his one arm, I believe it was inside the arm, I can't remember if it was his left or right but it seems like it was his right on the inside, in towards the van, and I asked him what it was; and that's when he [35] told me he was attempting to shoot up the cocaine when I pulled up to the van, and he took the syringe out and laid it on the floor of the van.

At that time I called our fire department, a crash fire rescue department, and asked for a paramedic to come up and check out Mr. Furst to be sure he was in a stable condition so I could transport him to jail. They did come to check him out and they advised that I should take him to Booth Hospital to be checked out even further since they didn't know how much cocaine he had injected. At the time neither did I.

Q. Would you describe what, if anything, you observed about Randy Furst's condition, either at the van or afterwards, other than the blood?

A. He was in a very intoxicated condition. His speech was slurred, he had a hard time standing up. When I told him to exit the van after drawing my service revolver, he had defecated in his pants and urinated also, if I remember correctly. His eyes were glassy. He was very much in disarray, his clothes and everything. There was needle marks up and down both arms where he had used syringes or appeared to have used syringes in the past. Like I said, his speech was slurred. I think I said that already.

Q. Did Mr. Furst say anything either at the scene [36] or later at the station house about his drug use? I think you have alluded to a couple of things already.

A. After reading his rights I asked him if he had been drinking or smoking or shooting, you know, taking cocaine today and he said yes, he had been doing all three. He had been down to a Cincinnati Reds ball game. He and his friend had been drinking beer all day, smoking marijuana, I don't know if it was there or on the way but he said they had been smoking marijuana plus he had stopped there to shoot up the cocaine. And in further questioning I saw the needle marks. I asked him if he had a habit, he said yes, he had quite a habit; they were shooting up several times a day while he was working and off. From the needle marks on his arms it appeared he had quite a problem at that time of arrest.

Q. All right.

MR. YUND: Now, I would like this marked as Company Exhibit 3.

(Thereupon, Company Exhibit 3 was marked for purposes of identification.)

Q. Officer Bunning, I handed you a copy of a document marked for identification as Company 3 and ask if you have seen that before?

A. Yes, sir. This is a copy of the paramedic run [37] sheet from that date on Mr. Furst.

Q. All right. And is that something that a copy of which was given to you and you routinely place paramedic reports in your arrest files?

A. Yes. If it involves where my prisoner has to be checked out by the paramedics or has to go to the hospital for some reason, I will place a report of the paramedic run into my report.

Q. All right. At what point, if any, was Mr. Furst arrested—I am sorry, was Mr. Furst charged with any crime?

A. He was charged with possession of cocaine which is a Class D felony in the state of Kentucky, possession of marijuana which is a Class A misdemeanor in the State of Kentucky, and possession of drug paraphernalia.

Q. And do you know about what point that happened in this whole process, was it the same day?

A. It was after I took him back to the office. I believe I told him what the charges were after transporting him.

MR. YUND: I would like this marked Company 4.

(Thereupon, Company Exhibit 4 was marked for purposes of identification.)

Q. Officer Bunning, I am handing you a document or

* * *

[44] inserted the needle. Other than that, I can't remember any bruises. There may have been from the past, you know, needles but I'm not positive.

Q. You said that he indicated to you he had some sort of problem with—

A. Yes, sir. Yes, sir, he did.

Q. With what?

A. With cocaine.

Q. Did he indicate how long had he been using it?

A. He couldn't remember. He told me for quite some time he had been injecting cocaine which is unusual to find people who actually mainline cocaine. He said he had been shooting up several times a day because of the habit.

Q. When and where did he make that statement?

A. It was at our station headquarters.

Q. In your presence?

A. Yes, sir.

Q. And who else was present?

A. I believe my lieutenant was there at the time, Lieutenant Watts.

Q. Was that statement recorded in any way?

A. It was on tape or anything like that, no, it was not. I may have recorded it in my report. No, it's not recorded in the report.

[45] Q. I notice that that is not anywhere indicated in your report which is Company Exhibit 1. Is there any reason why you omitted that from the report?

A. None, other than I didn't feel it was necessary.

Q. You didn't feel that a statement like that was necessary to be in the report?

A. No. It would—I felt it would not have had any outcome as far as, you know, the possession charge goes in court.

Q. Was Mr. Furst released after a short stay in jail?

A. He was let out on bond. I'm not sure what the bond was.

Q. Do you know how long he served in jail?

A. I really couldn't tell you.

Q. Was it just a short period for the processing and the setting of the bond?

A. I would say he probably got out either late on the 11th or early on the 12th. I'm not positive when he did get out though.

Q. Was there any indication or evidence that Mr. Furst or did you observe Mr. Furst at any time operating the van—

[46] A. No, sir, I didn't.

Q. —That you found him in?

A. No.

Q. Which seat was he sitting in?

A. He was in the passenger seat.

Q. Did you ask who had been driving the van?

A. Yes, I did. Mr. Meisberger stated, along with Mr. Furst, that Mr. Meisberger was driving it. That's who I saw get out of the driver's side at the time.

Q. Did you observe Mr. Furst using or injecting cocaine?

A. No, sir, I did not. Not at that time.

Q. Did you request that a blood test be run or be conducted?

A. I did not, no, for the simple reason that he was not the driver of the vehicle and he was not charged with driving under the influence of alcohol. I just wanted him checked out by the paramedics and possibly the hospital to make sure he was safe to be placed in the county jail.

Q. Is it usual that after apprehending someone in the possession of drugs that you would not have him subjected to a blood alcohol or blood test of some sort?

A. Is that unusual?

Q. Is that unusual or usual?

* * * * *

[54] A. Right.

Q. What did you actually review then in terms of formulating your response?

A. Just going back to the basic report, reviewing that, and seeing if Mr. Furst had any prior drug convictions, which he did not. I could find nothing on him.

Q. Do you ordinarily agree with the diversion program for first offenders?

A. Yes, I will, depending on the seriousness of the crime.

Q. In drug cases?

A. There's been one other drug case just recently where I agreed to the diversion program because the individual is working with the Drug Enforcement agents, Administration, rather, on a drug program at Miami University, so I did agree to that.

Q. Okay. Had you ever agreed to the diversion program for any other persons who you arrested for possession of drugs?

A. I may have, but I can't recall offhand.

Q. What are the kind of factors that you took into account?

A. On this case here?

Q. Yes.

* * * * *

[70] WITNESS CROFOOT:

if the supervisor is not tied up somewhere else he would have contact with him at night for maybe a half hour.

Q. Do these drivers ever make drop shipments which is a term that I heard for the first time from you and maybe you can explain what that is?

A. No, ours do not make drop shipments. A drop shipment is where you drop a product at the store, at the back door of the store, leave it, do not display it, do not service it; you only drop it and the store takes over from there. But we do not have any drops in our operation.

Q. And one last thing. Must the sales route driver be licensed to drive?

A. Yes.

Q. Now, were you acquainted with a route sales driver named Randy Furst who is the grievant here today prior to the events of last April that resulted in his suspension?

A. Yes.

Q. And where did he work?

A. He worked in the Versailles and Madison, Indiana depots.

Q. All right. What did you know about him as a route sales driver, if anything?

A. He was a good, average sales driver.

* * * * *

[82] A. None, none whatsoever.

Q. And he had been an employee continuously for ten years?

A. Yes.

Q. Had you ever received any complaints from any customers about his work performance?

A. Nope.

Q. Had you ever received any compliments from any customer or any other persons that he had come into contact with?

A. I hadn't.

Q. As far as you know, as far as you knew and as far as you still know today, during ten years of his employment he has been, I think you said, a good average. I take it that's little better than average?

A. Yes, I would say that.

Q. There has been nothing detrimental about his performance prior to this April incident?

A. True.

Q. And I think you testified that Mr. Furst is fairly loosely supervised, in other words, he pretty much carries out his daily work duties independent of close supervision. He is out on the road most of the time, is he not?

* * * * *

[84] Q. As regarding discipline?

A. Discipline?

Q. Is that something that you deal with fairly regularly?

A. I don't at my level. I have a personnel director who handles that for me.

Q. Let me ask you this, if you know the answer. Does the company have a policy that it applies in cases of employees being arrested for off premises conduct?

A. Not as it's spelled out, no.

Q. There is nothing in writing, I take it, of any kind?

A. No.

Q. Does the company always discipline an employee who is arrested for off premises conduct?

A. No.

Q. What about have any of your employees ever been arrested maybe and even convicted of driving while under the influence of alcohol?

A. Not to my knowledge.

Q. Does the company?

A. It could have happened and it was held up.

Q. Does the company have a policy with respect to disciplining or not disciplining an employee who might be [85] arrested and convicted for DWI?

A. If he is doing it on the job, yes.

Q. What if he was doing it off the job? What if he was arrested on his way to a football game in Indianapolis, stopped for being intoxicated while driving?

A. The only policy is that they are to report to work in a manner that they are able to perform their duties.

Q. So you wouldn't consider that to be the type of infraction that would warrant a suspension or discharge of some sort?

A. As long as there is no after effects from what they did that would apply to the job.

Q. That would apply to the job?

A. Job hours.

Q. And would that be true even if that person who was arrested for DWI and convicted of DWI was a driver?

A. If he is convicted, usually they lost their driver's license and they can't work then.

Q. In my experience not all persons who are convicted, unfortunately, you could say, lose their license. If they didn't lose their license and it didn't impact his ability to perform his job as a driver, the company would, I think you are saying, the company would not take any job action against that employee?

[86] A. Yes; that's right.

Q. Prior to this incident in April of 1984 did you have any reason to believe that Mr. Furst had any problems with either alcohol or other substance?

A. No.

Q. You have indicated that you suspended Mr. Furst within a short period of time after learning of his arrest, and this was, I take it, a suspension pending something. It had some terminal date on it, did it not?

A. Yes, as I said before.

Q. What was your contemplation as far as the duration of the suspension?

A. Very short-term. I mean, up to the maximum of three months.

Q. Was this in order for the company to complete its investigation or was this to await the outcome of the criminal proceedings?

A. Both. We wanted to find out just what was the case.

Q. When would you say that the company completed its investigation, internal investigation of the circumstances surrounding this arrest?

A. It really hasn't been terminated yet.

Q. It's still ongoing?

[87] A. Yes.

Q. It all depends on the outcome of the criminal proceedings?

A. Or the innocence that he proclaimed when I suspended him. He said he was absolutely innocent.

Q. Is the company's position that until he is acquitted by a court of law he will remain on suspension?

A. Yes. Not acquitted; he is found innocent.

Q. Same thing, I believe. If he is found innocent or, what, if the prosecutor would decide not to prosecute?

A. I think when I suspended him it pended his being found innocent.

Q. Found innocent by—

A. That's the words I used.

Q. By the courts or a jury?

A. Or whatever, yes.

Q. Now, I take it you didn't—you have never seen the Union Exhibit 2 prior to today?

A. No.

Q. And that's undoubtedly because it bears the file stamp date of just yesterday?

A. Yes.

Q. Is it your testimony that this does not change the company's view or position in any respect with regard to

* * * * *

[91] line of questioning considering another contract, under other conditions. I don't expect it under the guidelines that you have outlined to be ruled upon in my favor. I just want to note that for the record. Thank you.

THE ARBITRATOR: I think I will permit it with the understanding that we are not going to go through a whole series of hypothetical situations, are we, at this point?

MR. GROTH: No, I have no intention to do that, but I think I have a right to explore the company's policy.

THE ARBITRATOR: What I mean was this is not the whole start of a series of—

MR. GROTH: If it is, please cut me off. Sometimes I can't help myself. No, this is going to be limited just to this one question.

Q. Would the company's treatment of him have been any different had he worked in the bakery?

A. Anybody under constant supervision would have been different.

Q. And am I to assume from that that he most likely would not have been suspended?

A. For a short period of time is probably all.

[92] Q. But by now he would be back to work?

A. Yes. Due to the seriousness of driving that truck on the highway is tantamount to everything else.

Q. What if Mr. Furst had just been found with alcohol and been found to be under the influence of alcohol, would that have made any difference in your eyes?

MR. YUND: Again, I think we are going down the same road of hypotheticals in this case that are not the case in this case, Mr. Groth.

MR. GROTH: I think I am entitled to explore the company's policy. I think I am entitled to explore the company's implementation of its policies and I think that's very critical in terms of this case because the company has conceded that this offense, in quotations, is not specifically referenced by the

discharge provision, the discipline provision; therefore, the policy does come into play and it's not in writing, unfortunately, if it were we would save these questions. It's apparently an unwritten policy.

THE ARBITRATOR: I will permit it. You may go ahead as long as we don't go, as I said, into a whole series of ifffs.

Q. Do you remember my question?

* * * * *

[128] WITNESS FURST:

Q. What time did you leave in the morning?

A. I would say around 10 o'clock in the morning. The game would have been around 2 o'clock game, somewhere in that neighborhood. We gave ourselves enough time to get to the ball game.

Q. Did you take anything with you?

A. As in what?

Q. Did you take anything with you in the van or in the—

A. I took a cooler of beer.

Q. Did your friend have anything with him?

A. Yes, he had the substance with him.

Q. Prior to April the 11th had you ever experimented with cocaine or some other substances?

A. Yes, I had.

Q. And when did you first—

A. It was probably about a week to ten days before that I was with that guy another time before and he got me started on it.

Q. Prior to that you had never experimented with it?

A. No, sir.

Q. Did you ever inject cocaine at any time on April 11th or prior to April the 11th?

[129] A. No, sir.

Q. Tell us what happened. You went to the ball game, did you drink some beer at the ball game?

A. Yes, sir, we drank beer at the ball game and was on our way back.

Q. And tell us what happened from that point?

A. Well, it's closer to go through 275 to where we live, so we started that direction and the van was running hot. We pulled it off the side of the road to let it cool a little, and that's when Officer Bunning proceeded to arrest us.

Q. Whose cocaine and paraphernalia was that that Officer Bunning brought with him?

A. It belonged to Mark Meisberger.

Q. Did you inject any cocaine on that day?

A. Not on that day I did not.

Q. Did you have any needle marks in your arm?

A. I had some scratches on my arm, up and down my arms. I have might have had one. I didn't have all the markings that was said that I had.

Q. At this time were you a regular cocaine user?

A. No, sir.

Q. Have you used cocaine at any time since April the 11th?

* * * * *

[132] A. Yes.

Q. I see. And I take it that you have never then been tried on the charge of possession of cocaine?

A. No, sir.

Q. Did you ever receive any letter of suspension from the company?

A. No, sir.

Q. I think the grievance bears a date. Why did you file the grievance on the date that you filed it?

A. Okay. I called Pete and told him I was being suspended and he said well, did you get your letter of suspension and I said no. He said well, we have got to wait for a letter of suspension before you can really file a grievance.

So in the meantime Pete, I guess, was on vacation and when I come back he had to go to the hospital. Well, a friend of mine had talked to a union representative from Edinburg which is Dick Romeril and Dick told me—I was telling him about my case and he said for me to get down there and file a grievance.

Q. And you did?

A. And I did.

Q. Did you at any time during the course of April 11th in your arrest ever tell any officer or Officer Bunning [133] or any other person that you were a drug addict or a cocaine addict?

A. No, sir, I never did.

Q. Did you ever state or remark to anyone that you were a frequent user of cocaine?

A. No, sir, I did not.

Q. Were you intoxicated at the time of your arrest?

A. Yes, I probably was. I had quite a few beers that day.

Q. At the time of the arrest had you injected or done any cocaine?

A. No, sir. I was scared to death when the officer pulled his gun up to my head. I have had a series before of hyperventilation and I was having trouble breathing at the time and that was the reason why I was slurring. I was nervous, I couldn't talk, I couldn't do nothing.

Q. If you were intoxicated, however, it was as a result of consumption of beer; is that your testimony?

A. Yes.

MR. GROTH: You may cross-examine.

THE ARBITRATOR: If you want a few minutes or do you want to start right in.

PARAMEDIC REPORT

638383

RUN COMPLETE

NEW ALARM NO. 92

4-11-87
924PATIENT NAME: **John G. F...**
PATIENT SURNAME: **...**
PATIENT ADDRESS: **...**
PHONE: **41-603** # **5** HEIGHT: **5'10"** WEIGHT: **85kg**PATIENT LOCATION: **Holton** TnO **47042** VEHICLE LICENSE NO. **CMK 656**
PATIENT LOCATION: **Great in Cinn Airport Police Station** COUNTY CODE OF INCIDENT: **008**

LOCATION WAS:

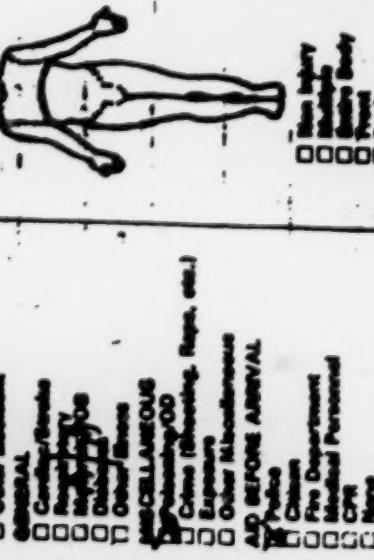
PATIENT'S PRESENTING COMPLAINTS:

NAME:		4-11-87
VEHICLE LICENSE NO.:		924
AMBULANCE SERVICE LICENSE NUMBER:		
STAFF ID (if applicable):		1/8/2
PATIENT REFUSED:		<input type="checkbox"/>
TRANSPORT:		<input type="checkbox"/>
PATIENT'S SIGNATURE:		

DISPATCH		NATURE OF RUN TRANSFER	
EMERGENCY		EMERGENCY	
URGENT		URGENT	
NON-URGENT		NON-URGENT	
NON-EMERGENCY		NON-EMERGENCY	
PATIENT REFUSED:		<input type="checkbox"/>	
TRANSPORT:		<input type="checkbox"/>	

PATIENT'S SIGNATURE:

VITAL SIGNS		VITAL SIGNS	
TEMP	184.2	TEMP	184.2
B.P.	154/110	B.P.	140
PULSE	140	PULSE	140
VITAL SIGNS CHILD NOT BE TAKEN			

DESTINATION: **Booth 4-2**

PATIENT TREATMENT:

Airway Fst.

Art. Vent.

Baby Delivery

Bleeding Control

Burn Treatment

Catherer App.

Draining App.

Enteral Nutrition

Inhalation

Intravenous Infusion

IV Admin.

IV Infusion

Ventricular Irrigation

FACILITY:

Hospital E.R.

Resident Home

Occupational Env.

Residence

Vital Signs

FOR WHAT APPARENT CARE?

Burn

Cardiac Care

Drug OD

High Risk Patient

Inj/Pain

Infectious Disease

CHARGES:

BASE RATE

MILEAGE RATE

PATIENT TREATMENT:

Burn

Cardiac Care

Drug OD

High Risk Patient

Inj/Pain

Infectious Disease

PATIENT TREATMENT:

Burn

Cardiac Care

Drug OD

High Risk Patient

Inj/Pain

Infectious Disease

PATIENT TREATMENT:

Burn

Cardiac Care

Drug OD

High Risk Patient

Inj/Pain

Infectious Disease

PATIENT TREATMENT:

Burn

Cardiac Care

Drug OD

High Risk Patient

Inj/Pain

Infectious Disease

PATIENT TREATMENT:

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Cardiac Care

Drug OD

High Risk Patient

Inj/Pain

Infectious Disease

PATIENT TREATMENT:

Burn

Cardiac Care

Drug OD

High Risk Patient

Inj/Pain

Infectious Disease

PATIENT TREATMENT:

Burn

Cardiac Care

Drug OD

High Risk Patient

Inj/Pain

Infectious Disease

PATIENT TREATMENT:

Burn

Cardiac Care

Drug OD

High Risk Patient

Inj/Pain

Infectious Disease

PATIENT TREATMENT:

Burn

Cardiac Care

Drug OD

High Risk Patient

Inj/Pain

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
TO VACATE ARBITRATION AWARD**

(Filed September 9, 1985)

Case No. C-1-85-1251

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

INTERSTATE BRANDS CORPORATION
BUTTERNUT BREAD DIVISION,
Plaintiff,

vs.

CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN
AND HELPERS, LOCAL UNION NO. 135,
Defendant.

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
TO VACATE ARBITRATION AWARD**

Pursuant to Rule 56, F.R. Civ. P., Plaintiff Interstate Brands Corporation, Butternut Bread Division, moves this Court for summary judgment in its favor on the ground that, as demonstrated by the attached memorandum in support, transcript and

exhibits and affidavit, there is no genuine issue as to any material fact and Plaintiff is entitled to the relief prayed for in its Complaint as a matter of law.

Respectfully submitted,

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Case No. C-1-85-1251

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

INTERSTATE BRANDS CORPORATION
BUTTERNUT BREAD DIVISION,
Plaintiff,

vs.

CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN
AND HELPERS, LOCAL UNION NO. 135,
Defendant.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT TO
VACATE ARBITRATION AWARD

INTRODUCTION

Interstate Brands Corporation, Butternut Bread Division ("Interstate," the "Company" or "Plaintiff") and Local Union 15, Chauffeurs, Teamsters, Warehousemen and Helpers (the "Union" or "Defendant") entered into a written labor agreement effective from July 12, 1982 through July 13, 1985 (Jt. Ex. 1).¹ The agreement contained a grievance and arbitration procedure for resolving any grievance

¹ A copy of the arbitration hearing transcript and copies of exhibits introduced at the hearing are attached as Exhibit A. Citations to the transcript are stated as "(tr ____)"; exhibits are referenced as "(Co. Ex. ____)", "(Union Ex. ____)" or "(Jt. Ex. ____)".

concerning wages, hours and any other condition of employment which expressly provided that a grievance "shall" only be filed, if at all, within 15 days of its occurrence.

The facts underlying the arbitration award at issue herein are as follows: On April 11, 1984 Randy Gene Furst ("Furst" or "Grievant"), employed by Interstate as a route driver/salesman, was arrested by the Greater Cincinnati Airport Police while he was off duty and charged with three separate crimes: (i) possession of cocaine; (ii) possession of marijuana; and (iii) possession of drug paraphernalia.² It was not disputed that at the time of his arrest Furst was attempting to inject cocaine intravenously into his arm, a procedure known as "mainlining" (Tr. 35, Co. Ex. 1 at 2). After observing needle marks on Furst's arms, the arresting officer, Officer Bunning, summoned a paramedic (Tr. 35). The paramedic's report (Co. Ex. 3) recorded the existence of needle marks up and down Furst's arms.

Shortly thereafter, Fred Crofoot, Interstate's General Manager, heard a rumor that Furst had been arrested on a drug charge (Tr. 71). On April 19, 1984 three company officials, including Crofoot and Brian Conley, Personnel Manager and Safety Director, confronted Furst with the unconfirmed reports (Tr. 72, 73). Furst denied that the rumors were true (Tr. 74).

On April 20, 1984 Crofoot received copies of the arrest report (Co. Ex. 1) and the paramedic report (Co. Ex. 3). Consequently, Crofoot and Conley again confronted Furst who claimed that he had been framed (Tr. 75; 76). Crofoot immediately suspended Furst

² Kentucky has no law prohibiting *use* of narcotics; only possession is prohibited (Tr. 433, lines 20-22).

pending outcome of the criminal matter (Tr. 76). Conley informed the Union of Furst's suspension by telephone a day or so later (Tr. 104).

On June 8, 1984—48 days after he was suspended—Furst filed a grievance protesting the suspension (Jt. Ex. 2). Interstate denied the grievance because it was untimely (Jt. Ex. 3).

On October 19, 1984 Furst was indicted on all three charges (Tr. 38; Co. Ex. 4). On February 20, 1985 the Boone County Circuit Court held a hearing on the propriety of Furst's entering into a felony diversion program which would require Furst to complete a drug rehabilitation program and to refrain from committing a criminal act for one year (Tr. 38; 39). The Kentucky court approved the Diversion Agreement on February 25, 1985 under which the criminal charges remain pending through February, 1986 (Union Ex. 2; Tr. 39).

Because the parties were unable to settle Furst's grievance protesting the suspension from employment pursuant to Article VII of the collective bargaining agreement, a hearing on the grievance was held before Arbitrator Arthur R. Porter, Jr., on February 26, 1985 at Cincinnati, Ohio. At the Company's request the Arbitrator subpoenaed Officer Bunning to testify at trial. Bunning brought the police department file on Furst pursuant to a *subpoena duces tecum* (Tr. 26). Importantly, Interstate first learned of the Kentucky court's entry of the Diversion Agreement at the arbitration hearing (Tr. 87).

As demonstrated by their nearly identical framing of the issues to be presented to the Arbitrator in their post-hearing briefs, the parties agreed that the following issues were before him: (i) whether the grievance was

timely filed; and (ii) whether the Grievant's suspension was for just cause (Relevant pages of Union's brief to Arbitrator attached as Exhibit B; Relevant pages of Interstate's brief to Arbitrator attached as Exhibit C). The issue of whether the Company should reinstate or *discharge* Furst should the Arbitrator sustain the grievance protesting the suspension was not before the Arbitrator.

The Arbitrator issued his written opinion on May 25, 1985. A copy of the Arbitrator's Opinion is attached as Exhibit D. The Arbitrator asserted jurisdiction over the merits, sustained the grievance, and ordered not only that the indefinite suspension end but also enjoined Interstate to continue to employ Furst, thereby exceeding the scope of issues submitted to him and improperly removing from the Company's hands the alternative of discharge.

Plaintiff has moved for an order vacating that award pursuant to §301 of the Labor Management Relations Act ("LMRA") and the Federal Arbitration Act, 9 U.S.C. §§6, 10 and 12.

RELEVANT PROVISIONS FROM THE LABOR AGREEMENT

Article VI, Section 1:

The Employer shall not discharge nor suspend any employee without just cause, but in respect to discharge or suspension shall give at least one (1) warning notice of the complaint against such employee to the employee, in writing, and a copy of the same to the Union, except that no warning notice need be given to an employee before he is discharged if the cause of such discharge is dishonesty or drunkenness, or recklessness resulting in serious accident while on duty, or the carrying of

unauthorized passengers. The warning notice as herein provided shall not remain in effect for a period of more than twelve (12) months from the date of said warning notice. *Discharge must be by proper written notice to the employee and the Union* . . . (emphasis added).

Article VII, Section 3:

It is agreed by the parties that all disputes or grievances shall be settled in accordance with the procedure outlined as follows in this Article. (a) The grievance shall be filed within fifteen (15) days of its occurrence, or the parties awareness thereof and shall be reduced to writing by the complainant. In the event that such grievance is not submitted within this fifteen (15) day period, said grievance shall automatically be decided in favor of the defending party. In case of discharge the grievance shall be filed within five (5) days of its occurrence (emphasis added).

Article VII, Section 3:

(f) The arbitrator may interpret the Agreement and apply it to the particular case presented, *but the arbitrator shall have no authority to add to, subtract from, or in any way modify the terms of this Agreement or any agreement made supplementary hereto* (emphasis added).

ARGUMENT

A. THE ARBITRATOR EXCEEDED HIS AUTHORITY IN DECIDING THE GRIEVANCE ON THE MERITS SINCE HE SPECIFICALLY FOUND THAT GRIEVANT AND THE UNION WAIVED THE RIGHT TO CHALLENGE THE SUSPENSION BY THEIR DELAY IN FILING THE GRIEVANCE.

The plain and unambiguous language of the contract, Article VII, Section 3(a) provides as follows:

It is agreed by the parties that all disputes or grievances shall be settled in accordance with the procedure outlined as follows in this Article. The grievance shall be filed within fifteen (15) days of its occurrence, or the parties' awareness thereof and shall be reduced to writing by the complainant. In the event that such grievance is not submitted within this fifteen (15) day period, said grievance shall automatically be decided in favor of the defending party. In case of discharge the grievance shall be filed within five (5) days of its occurrence (emphasis added).

Crofoot informed Furst on April 21, 1984³ that he was suspended effective immediately until "this thing was dismissed proving his innocence" (Tr. 76). Conley informed the Union of Furst's suspension a day or so later (Tr. 104, 112).

On April 21, 1984 Furst was fully aware that he was suspended pending the dismissal of the criminal charges against him. Under Article VII, §3(a) of the labor agreement Furst had until May 6, 1984 to file a grievance protesting his suspension. He did not file his grievance until June 8, 1984—33 days late.

The Arbitrator found that Furst had waived his right to challenge the suspension because of the late filing:

The arbitrator holds that the grievant did waive his right to challenge the initial suspension of April 11 (sic) by the long delay in filing his protest grievance.

* * *

³ In his opinion and award Arbitrator Porter indicated that the suspension occurred on April 11 (Op. and Award, p. 6). This is an obvious mistake, since there was no dispute at the arbitration hearing that Furst's *arrest* occurred on April 11, 1984; he was *suspended* on April 21 (Tr. 75-76).

The grievant and the union missed their rights to protest the initial suspension by the failure to file a grievance within fifteen days from April 11 (sic), 1984.

(Op. and Award, p. 6). Despite his specific finding of waiver, the Arbitrator improperly proceeded to decide the grievance on its merits.

Although timeliness, like other procedural questions, is an issue for the arbitrator to decide in the first instance, that decision is reviewable to the same extent and in the same manner as his decision on substantive matters. *See, John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964).

An arbitrator's authority is limited by the terms of the labor agreement and his award must "draw its essence" from the agreement. *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960); *see also International Brotherhood of Firemen and Oilers v. The Nestle Company, Inc.*, 630 F.2d 474, 477 (6th Cir. 1980) (where contract provided that insubordination "shall" constitute cause for dismissal and arbitrator made a specific finding that insubordination occurred, arbitrator erred in deciding that discharge was too severe a penalty and in declining to enforce the unambiguous provisions in the contract); *Amanda Bent Bolt v. UAW Local 1549*, 451 F.2d 1277, 1278-79 (6th Cir. 1971) (where contract's no-strike clause clearly established discharge as the penalty and arbitrator found that employees "unequivocably violated" the prohibition against strikes, arbitrator erred in granting discharged employees reinstatement with full seniority since such action was contrary to terms of contract). If an award deviates from the plain meaning of the labor agreement it must find support in the

agreement itself or in the past practice between the parties. If an examination of the record before the Arbitrator reveals no support whatsoever for his determination, his award must be vacated. *Grand Rapids Die Casting v. Local Union 159, UAW*, 684 F.2d 413, 416 (6th Cir. 1982); *Detroit Coil Company v. International Association of Machinists and Aerospace Workers*, 549 F.2d 575, 580-581 (6th Cir. 1979), cert. den'd 448 U.S. 840 (1980), citing *NF&M Corp. v. United Steelworkers of America*, 524 F.2d 756, 760 (3rd Cir. 1975).

There is no support in the agreement or in the parties' past practice for the Arbitrator's treatment of the grievances as timely despite the fact it was filed 48 days after the date of the alleged violation. The contract gives a grievant 15 days within the date of a violation's occurrence to file his grievance.

In an obvious effort to justify his avoidance of the parties' agreement and instead fashion "his own brand of industrial justice", the Arbitrator found tht the suspension was a "continuing act" (Op. and Award, p. 6). However, an examination of the record before the Arbitrator and now before this Court reveals no support whatsoever for the theory that the suspension constituted a "continuing act."

On April 21, 1984 Furst was fully aware that he was suspended until the drug charges against him were dropped. On April 21 Furst knew that there was no date certain on which his suspension would be lifted or converted to a discharge. The act of suspension—Crofoot's oral communication to Furst—occurred at a specific time and place. At that time and place Furst was aware of the suspension's terms and conditions. What Furst knew on June 8, 1984 was exactly what he knew on April 21, 1984—that he

was suspended for an indefinite period until the criminal charges were dismissed. The Arbitrator attempted to rewrite history to suit his conclusion by labeling the suspension which occurred on April 21, 1984 an "initial" suspension (Op. and Award, pp. 5-6), as though some subsequent suspension which Furst timely grieved, is without a shred of support in the record. A *single* suspension, occurring on April 21, was grieved 33 days too late.

The grievance filed on June 8, 1984 makes no mention of the "continuing" nature of the violation, but merely protests that the Company suspended Furst without just cause (Complaint, Exhibit B). The Arbitrator was forced to admit that "the grievance emphasizes the act of suspension rather than its continuing nature." (Op. and Award, p. 6). Moreover, the record establishes beyond dispute that the cause of Furst's failure to file a timely grievance was a mistake, not doubt about his status with the company or the nature of the suspension. The Union's business representative admitted advising Furst that the 15 day time period for filing a grievance did not begin to run until Furst received *written notice* of his suspension (Tr. 114). Furst relied on that advice until he talked with a second union representative:

Q. I think the grievance bears a date. Why did you file the grievance on the date that you filed it?

A. Okay. I called Pete and told him I was being suspended and he said well, did you get your letter of suspension and I said no. He said well, we have got to wait for a letter of suspension before you can really file a grievance.

So in the meantime Pete, I guess, was on vacation and when I came back he had to go to the hospital. Well, a friend of mine had talked to a union

representative from Edinburgh which is Dick Romeril and Dick told me—I was telling him about my case and he said for me to get down there and file a grievance.

Q. And you did?

A. And I did.

(Tr. 132). The Arbitrator specifically and correctly found that under Article VI, Section 1 "a written suspension is *not necessary under the agreement.*" (Op. and Award, p. 5 emphasis added).

The Arbitrator found that it offended his *personal* sense of fairness that no certain date was established for the end of the suspension in that it left the Grievance "in limbo." (Of course, this finding ignores that the company's only alternative at the point it suspended Furst was discharge, which the Company submits that Furst would have considered far more unfair!). However, the Arbitrator was without authority to read his own notion of fairness into the contract and to expand the contractually established time limit for filing a grievance by concocting a continuing violation theory. *See, Local 342, U.A.W. v. T.R.W., Inc.*, 402 F.2d 727 (6th Cir. 1968) (where contract authorized employer to discharge all or selected employees for participation in work stoppage during term of contract, arbitrator's order reinstating employees discharged pursuant to that provision because discharges did not comport with his idea of fundamental fairness, constituted improper addition of terms to negotiated contract).

This is not a case where vague language is in dispute. The parties bargained and agreed on a time limitation which is clear and specific. By blatantly disregarding the bargained-for contract language, the Arbitrator upset the very nature of the contract as a

negotiated document which establishes the rights and duties of the parties. Such action, if not vacated by this Court, threatens the heart of the collective bargaining process and the ability of both parties to bargain, reach an agreement, and rely on its clear language.

B. THE ARBITRATOR EXCEEDED HIS AUTHORITY IN ORDERING FURST'S REINSTATEMENT SINCE HE SPECIFICALLY FOUND THAT THE COMPANY PROPERLY SUSPENDED GRIEVANT ON APRIL 21.

The Arbitrator specifically found that the Company properly suspended Grievant on April 21:

There is little doubt that grievant Randy Furst did use cocaine on April 11, 1984. The testimony of officer Bunning (sic), the police laboratory report, the report of the paramedic who checked Mr. Furst at the sight (sic) on April 11, and even the testimony of the grievant, confirm the use of cocaine. *An initial suspension by the company, pending a more complete investigation, was warranted.* A driver who uses illegal drugs is a possible danger to himself, the company and the general public. The company had the right to use the time to investigate to determine the degree of guilt, if any, and what action to take under the circumstances.

(Op. and Award, p. 5, emphasis added). However, the Arbitrator set aside the suspension and ordered Furst's reinstatement because, in his personal opinion, there were "deficiencies" in the "procedures used by the company shortly before and after the initial suspension." *Id.* at p. 5. The issue submitted to the Arbitrator was whether the Company's suspension of Furst was for just cause. Once the Arbitrator found that the April 21 suspension was for just cause, he was precluded from

setting aside that suspension on grounds of alleged procedural deficiencies that are based on his personal whim and not in the language of the agreement or in the parties' past practice. *Local 342, U.A.W. v. T.R.W.*, *supra* at p. 7; *Chemineer, Inc. v. Machinists Local 225*, 573 F.Supp. I (S.D. Ohio 1983) (J. Rice); *E.I. DuPont de Nemours & Co. v. Grasselli Employees Ass'n*, ____ F.Supp. ____, 118 LRRM 3321 (BNA) (N.D. Ind. 1985); *Copaz Packing Co. v. UFCW Local 7A*, ____ F.Supp. ____, 119 LRRM 2279 (BNA) (S.D. Ohio 1984) (J. Spiegel).

The Arbitrator listed four procedural "deficiencies." (Op. and Award, p. 5). First, he noted that management failed to put the suspension in writing. However, he specifically found that such a written suspension was *not necessarily* under the agreement (Op. and Award, p. 5). The Arbitrator's opinion that a written suspension would have "made for less confusion" is interesting, but not controlling. An arbitrator does not sit to rewrite the terms of the parties' negotiated labor agreement to accord with his personal notions of procedural clarity. In doing just that, Arbitrator Porter exceeded his authority so that his award did not "draw its essence from the collective bargaining agreement."

Second, the Arbitrator objected that "there was no limit set on the time for the suspension." He vaguely suggested that management could have used time limits for "investigation" and to "review what to do next" (Op. and Award, p. 5). The issue submitted to the Arbitrator was whether just cause existed for the suspension of Furst, a query answered affirmatively by the Arbitrator. There is *no provision* in the agreement that a suspension must have a definite termination date.

Moreover, the Arbitrator's foggy suggestion that management should have used time limits to "investigate" has no basis in the record or reality. The Company did as much as it could do to investigate *before* suspending Furst. By April 20, 1984 the Company had secured a copy of the police report and the paramedic report (Co. Exs. 1 and 3). The police report confirmed that Furst was attempting to "mainline" cocaine at the time of his arrest. The paramedic report confirmed the existence of needle marks up and down Furst's arms. Confrontation with Furst resulted only in Furst's mendacious denials that the arrest had even occurred (Tr. 74-76). Under Kentucky law the active, investigative files of police are not open to public inspection until prosecution is completed or a determination not to prosecute has been made. K.R.S. §17.150(2). The Company's one contact with courthouse officials to check on the status of the criminal charges against Furst resulted in accusations by the Union that the Company was meddling to Furst's detriment (Tr. 94-95; 105). There is no evidence that there were other avenues of investigation for the Company to pursue. The criminal matter was not resolved until the day prior to the arbitration hearing (Union Ex. 2), and the only opportunity that the Company had to compel the police to provide further information was the subpoena it had the Arbitrator issue in this case to secure the testimony of Officer Bunning.

The Company's only alternative to what it did—provide Furst the opportunity, through the defense of the criminal charge against him, to prove his innocence and thereby regain his employment with retention of benefit and seniority rights—was to discharge him. The Arbitrator's suggestion that the Company could have used a finite suspension period to

review "what to do next" is simply chimeric. Given the seriousness of the charges against Furst and the nature of his job the Company's only alternative to suspension was discharge. The Arbitrator specifically found that the April 21, 1984 suspension was warranted because:

A driver who uses illegal drugs is a possible danger to himself, the company and the general public.

(Op. and Award, p. 5). There is no rational reason for holding, on the facts of this case, that Furst constituted a possible danger because of his illegal drug habit in April, 1984, but was somehow entitled to reinstatement after some unspecified amount of time. Without a determination of Furst's status by the Kentucky courts, the Company's only choice to continuing the suspension was discharge.

The Arbitrator's award of reinstatement violates public policy. Interstate should not be required to cause, and the public should not have to risk, the employment of a chronic illegal drug user to drive a 20 foot delivery truck on the public highways to schools and food stores (Tr. 77). The public policy against the operation of motor vehicles by persons with drug habits is embodied in our state laws. Kentucky, Indiana and Ohio law prohibit the issuance of a driver's license to persons with drug habits. K.R.S. 186.440(A); I.C.A. 9-14-30 §30(c); O.R.C. §4507.08(A). As recognized by the Fifth Circuit Court of Appeals, fundamental decency militates against such a decision. In *Local 540 v. Great Western Food Co.*, 712 F.2d 122 (5th Cir. 1983), the court ruled that the enforcement of an arbitration award requiring an employer to reinstate a discharged over-the-road truck driver who admittedly drank liquor while on duty would violate public policy. The arbitrator ordered his

reinstatement because of deficient procedures *viz.*, an alleged failure to investigate sufficiently. The court explained its holding:

In a nation where motorists practically live on the highways, no citation of authority is required to establish that an arbitration award ordering a company to reinstate an over-the-road truck driver caught drinking liquor on duty violates public policy . . . A driver who imbibes the spirits endangers not only his own life, but the health and safety of all other drivers. These considerations are convincing enough with respect to drivers of automobiles. They become even more compelling when the driver is regularly employed to cruise the highway as in a massive tractor-trailer rig.

Id. at 124. See also *Misco, Inc. v. United Paperworkers International Union*, ____ F.2d ____ (Slip Op. Aug. 19, 1985, copy attached), in which the court vacated an arbitrator's award that violated the public policy against employment of a drug user to operate unusually dangerous equipment. In such a case, the court reasoned, a "procedural error" cited by the arbitrator in the employer's investigation "simply did not matter . . . [the arbitrator's] narrow focus on [the grievant's] procedural rights has led him to enter an award directing the employer to put [him] back to operating a hazardous machine . . . an award that is plainly contrary to serious and well-founded public policy." *Id.* at p. 5.

The record establishes beyond rational doubt that the Company had cause to believe that the reinstatement of Furst constituted a public danger. Furst admitted to Officer Bunning, whose testimony the Arbitrator credited, that he had a cocaine habit and that he shot up several times a day on duty and off (Tr. 36, 44). Bunning and the paramedic observed needle marks up and down

Furst's arms (Tr. 36; Company Exhibit 3). Until Furst's status is established by the appropriate Kentucky authority, Interstate should not be required to employ a cocaine user in a loosely supervised position which requires driving on the public highways and close contact with customers—including schools (Tr. 77; Op. and Award, p. 2).

The third "deficiency" cited by the Arbitrator is that the Company's position put Furst "in a difficult position." That Furst was in a difficult position has nothing to do with whether the Company had just cause to suspend him. Every disciplinary action puts the employee in a "difficult position." As noted above, the only alternative was discharge—an even more "difficult position."

Fourth, the Arbitrator found that "no guidelines or policy was (sic) used by the Company to judge off the premises, off hour activities by driver/salesman" (Op. and Award, p. 5). Specifically, the Arbitrator found that the Company unfairly distinguished between alcohol and cocaine:

The Company destroyed its agreement (sic) that the allegation of use of drugs was sufficient to permit an extended suspension, without time limit, by its policy to permit a convicted DWI employee the chance to return to work without any disciplinary action. Drugs and alcohol both influence driving behavior. The Company has the right to be concerned about its public image, ability for driver/salesmen to sell and public safety on the highway. It must try for consistency (sic), however, in the application of such a policy (Op. and Award, p. 6). If the company is going to distinguish between drug and alcohol abuse, it has to make such distinction clear and be prepared to defend that distinction (Op. and Award, p. 6).

The Arbitrator does not sit to impose his personal *mores* on the parties. He may not substitute his personal judgment that alcohol (a common legal substance) and cocaine (a prohibitively expensive, illegal and destructive drug) are alike, for the Company's belief that there is a rational difference. Moreover, the Arbitrator's decision is arbitrary and capricious since he based the drug/alcohol analogy *entirely* upon a *hypothetical* question put to Crofoot by the Union's attorney:

Q. If Mr. Furst had been charged solely with use or charged for driving under the influence of alcohol, would the Company's policy have been any different with respect to his ultimate suspension/discharge or would the Company still have suspended him?

A. There is different laws on alcohol than there is on drugs.

Q. I don't know that that's responsive, is it? Is that a yes or a no?

A. It would be different because it happens.

Q. It would be less or it would be more severe?

A. Less severe.

(Tr. 9). Crofoot's testimony was in response to a hypothetical question which compared a misdemeanor conviction for driving under the influence of alcohol *on a single occasion* with habitual cocaine use, a felony. The situations just cannot reasonably be equated. There is no evidence in the record that the Company failed to distinguish between similar situations of drug and alcohol abuse. There is no evidence that the Company, in its actual implementation of discipline, distinguished between alcohol and drug habits which were comparable in the danger they represented to the Company and the public. The Arbitrator improperly based an award of reinstatement on a false and hypothetical analogy.

Finally, the Arbitrator improperly exceeded the scope of the parties' submission. As noted above, the following two issues were before the Arbitrator: (i) whether the grievance was timely filed; and (ii) whether the Grievant's suspension was for just cause. *See, Exhibits B and C.* Assuming *arguendo* that the Arbitrator properly decided that there should have been a finite suspension period, the issue of what action the Company should have taken once that suspension properly terminated was *not* before the Arbitrator. Nonetheless, the Arbitrator decided not only that Furst's suspension should have been finite, but that the Company was forced to reemploy him. Thus, the Arbitrator's award impermissibly removed from the Company's hands the decision of what to do with Furst upon the termination of the suspension. Because the Arbitrator decided an issue that was not before him his order and award should be vacated. *See e.g., Chemineer, Inc. v. Machinists Local 225, supra* at page 12 (Arbitrator's award vacated where only questions submitted to arbitrator was whether employer had "just cause" to discharge employee, but arbitrator exceeded the scope of submission by overturning the penalty of discharge) [citing] *Buckeye Cellulose Corp. v. United Auto Workers District 65*, 689 F.2d 629, 630-31 (6th Cir. 1982) (per curiam); *Piggly Wiggly Operators' Warehouse, Inc. v. Piggy Wiggly Operators' Warehouse Independent Truck Drivers Union*, 611 F.2d 580, 583-584 (6th Cir. 1980); *Wright-Austin Co. v. United Auto Workers*, 422 F.Supp. 1364, 1368 (E.D. Mich. 1976).

CONCLUSION

Arbitrator Porter disregarded his obligation to decide only those contractual issues properly before him and not to "dispense his own brand of industrial justice" based on what he thinks is "fair" or what he thinks the parties should have agreed on in their contract. Accordingly, the award, which purports to decide a grievance untimely filed and compel the reinstatement and continued employment of Randy Furst, should be vacated.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion and Memorandum In Support, and the attached Exhibits, has been served upon William R. Groth, attorney for defendant, 1213 N. Arlington Avenue, Suite 204, Indianapolis, Indiana 46219, and on Thomas J. Kircher, Kircher and Phalen, Suite 1000, 125 E. Court Street, Cincinnati, Ohio 45202, by ordinary U.S. mail, postage prepaid, this 9th day of September, 1985.

/s/ GEORGE E. YUND

Case No. C-1-85-1251

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

INTERSTATE BRANDS CORPORATION
BUTTERNUT BREAD DIVISION,
Plaintiff,

vs.

CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN
AND HELPERS, LOCAL UNION NO. 135,
Defendant.

AFFIDAVIT

I, George E. Yund, being duly sworn and cautioned, hereby depose and state:

1. I am a partner in the law firm of Frost & Jacobs, 201 E. Fifth Street, Cincinnati, Ohio 45202. In that capacity I represent the plaintiff in the above-referenced matter, Interstate Brands, Butternut Bread Division.

2. I represented Interstate Brands in the grievance proceeding instituted by Randy Gene Furst pursuant to the collective bargaining agreement between Interstate and Local Union No. 135, Chauffeurs, Teamsters, Warehousemen and Helpers.

3. I was present at the arbitration hearing on Furst's grievance before Arbitrator Arthur S. Porter, Jr. on February 26, 1985 at Cincinnati, Ohio.

4. The copy of the arbitration hearing transcript and the copies of the exhibits introduced at hearing, attached hereto as Exhibit A to Plaintiffs' Motion for Summary Judgment, are true and accurate copies of the transcript recorded and exhibits submitted to the best of my knowledge and belief.

5. The copies of the cover page and first two pages of the Union's brief submitted to Arbitrator Porter and served on me by William R. Groth, attorney for Local Union No. 135, attached hereto as Exhibit B to Plaintiffs' Motion for Summary Judgment are true and accurate copies to the best of my knowledge and belief.

6. The copies of the cover page and first page of the brief submitted to Arbitrator Porter by Interstate, attached hereto as Exhibit C to Plaintiffs' Motion for Summary Judgment are true and accurate copies to the best of my knowledge and belief.

7. The copy of Arbitrator Porter's Opinion, dated May 25, 1985 and received by me shortly thereafter, attached hereto as Exhibit D to Plaintiffs' Motion for Summary Judgment is a true and accurate copy to the best of my knowledge and belief.

The above is true and correct to the best of my knowledge and belief.

/s/ GEORGE E. YUND
George E. Yund

Sworn to and subscribed before me this 9th day of September, 1985.

/s/ JO ANN McDERMOTT
Notary Public

[JO ANN McDERMOTT
Notary Public, State of Ohio
My Commission Expires Dec. 11, 1989]



(2)
No. 90-911

Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

October Term, 1990

INTERSTATE BRANDS CORPORATION,
Butternut Bread Division,

Petitioner,

vs.

CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN AND
HELPERS, LOCAL UNION NO. 135,

Respondent.

**Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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STATEMENT OF THE CASE

Certain omissions and inaccuracies in the Statement of the Case presented by Petitioner Interstate Brands Corporation, Butternut Bread Division (hereinafter "Petitioner" or "Interstate") require that Respondent Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union No. 135 (hereinafter "Respondent" or "Local 135") supplement Petitioner's Statement of the Case.

In addition to jurisdiction pursuant to 28 U.S.C. §1331, the United States District Court, Southern District of Ohio, Western Division, had jurisdiction of this matter under Section 301(a) and (c) of the Labor-Management Relations Act, as amended, 29 U.S.C. §185(a) and (c), which provides as follows:

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * *

(c) Jurisdiction. For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

The grievance procedure of the collective bargaining agreement between Interstate and Local 135 requires that a grievance be filed within fifteen (15) days "of its occurrence, or the parties' awareness thereof" [emphasis added] (Petitioner's Appendix at A60).

In its Statement of the Case, Interstate sets forth certain facts concerning the events which gave rise to the underlying grievance. In so doing, Interstate did not confine itself to the facts found by the arbitrator, but included references to selected testimony from the arbitration hearing which was not specifically credited by the arbitrator and which was controverted by other testimony. While Local 135 questions the propriety of relying on such evidence in its Argument *infra*, in order to present a more accurate picture and comply with Rule 15.1 of this Court, Local 135 is compelled to draw the Court's attention to other portions of the arbitration transcript should the Court find it necessary to look beyond the arbitrator's findings.

In his initial award, the arbitrator made the following factual findings regarding the conduct of the grievant, Randy Furst, which led to his discipline by Interstate:

(1) Mr. Furst and a friend attended a baseball game of the Cincinnati Reds in Cincinnati, Ohio on April 11, 1984 (tr 128). Mr. Furst took a considerable amount of beer to the game (tr 129).

(2) On the way home to Indiana from the game, Mr. Furst and his friend stopped on a road near the Cincinnati Airport (Ky. 20). Police officer David W. Brunning [sic], who is an officer employed by the Kenton County Airport Authority, checked out the stopped vehicle.

(3) Furst and his friend explained they had stopped to let the motor cool off, but officer Brunning [sic] testified that the motor was still running (tr 23).

(4) Officer Brunning [sic] discovered Mr. Furst in a disoriented condition, speech slurred and with the smell of alcohol on his breath (tr 42).

(5) Officer Brunning [sic] noted blood on grievant Furst's arm (tr 34). Mr. Furst told officer Brunning [sic] that he was in the process of shooting cocaine. He had pulled out a syringe and laid it on the floor (tr 35). Needle marks were all up and down both arms of the grievant (tr 35).

(6) Cocaine, marijuana and drug paraphanalia [sic] were found in the van (tr 33, c 2). Mr. Furst was indicted in Kentucky for the possession of cocaine, marijuana and drug paraphanalia [sic] (tr 37, c 4).

(7) Upon recommendation of officer Brunning [sic], the court ordered the placement of grievant Randy Furst in a diversion program (tr 38, 39, u 2) which involves the following:

- (a) Participation in a rehabilitation program
- (b) Must be an outpatient or inpatient
- (c) Stay out of trouble for one (1) year
- (d) If grievant does not agree or if he breaks agreement, Mr. Furst is subject to be tried on the charges
- (e) Charges will not be dropped until the diversion program is completed

(Petitioner's Appendix at A31-32). With regard to Furst's drug use, the arbitrator found *only* that "Randy Furst did

use cocaine on April 11, 1984" (Petitioner's Appendix at A36).

Interstate quotes further arbitration testimony from the police officer concerning statements allegedly made by Furst about the extent of his drug habit. Nowhere in his award did the arbitrator incorporate or credit this testimony. Not only did the arresting officer inexplicably fail to record Furst's alleged admissions in his report (Respondent's Appendix at A2), but Furst testified at the hearing that he had never used cocaine until about ten (10) days prior to his arrest (Respondent's Appendix at A4-5). Further, Furst denied both that he was a "regular cocaine user" and that he told the arresting officer that he was an addict (Respondent's Appendix at A6, 8). Finally, *undisputed* testimony by the police officer establishes that Furst had not been driving but was sitting in the passenger seat of the parked van and that it was his friend who had been driving the van (Respondent's Appendix at A3).

Interstate never discharged Furst as a result of his arrest, but, instead, placed him on an indefinite suspension that would last until the criminal charges were "dismissed proving his innocence" (Petitioner's Appendix at A32). The arbitrator found that because of the status of the criminal proceedings against Furst (at the time of the initial award, an uncompleted one-year diversion program) "proving your innocence may be a difficult or impossible act" (Petitioner's Appendix at A36).

Furst filed a grievance that protested that his suspension was "without just cause" and requested the remedy of reinstatement and back pay (Petitioner's Appendix at

A29). In its Statement of the Case, Interstate contends that the issue of the appropriate remedy should the arbitrator sustain the grievance was not before the arbitrator (Petitioner's Brief p. 7). This statement is not one of fact, but of argument by Interstate. The grievance, which requested reinstatement and back pay, clearly placed the remedy in issue. In any event, the scope of the arbitrator's authority to fashion a remedy was not raised by Interstate before the Sixth Circuit, nor has it been raised as an issue before this Court.

In supplemental proceedings before the arbitrator as the result of a remand to the arbitrator by the District Court on the issue of back pay, the parties stipulated certain facts without agreeing that all of the facts were relevant to the arbitrator's determination (Petitioner's Appendix at A42). The stipulations revealed, *inter alia*, that more than two years after his disciplinary suspension Furst was twice charged with driving while under the influence, and that upon the second occasion, his driver's license was suspended for 30 days (Petitioner's Appendix at A40-41). In a procedural ruling concerning what matters were relevant to his determination, the arbitrator refused to consider these remote post-suspension incidents in his supplemental award issued on August 20, 1988 (Petitioner's Appendix at A47-48). The arbitrator ordered Interstate to reinstate Furst effective October 11, 1984, six months after his arrest, and to pay back pay and benefits, less interim earnings and unemployment compensation, for the time lost.

SUMMARY OF ARGUMENT

I. Waiver of Judicial Determination of Substantive Arbitrability Questions Decided by the Arbitrator.

The case below does not present an appropriate opportunity for this Court to decide the first question presented for review by Petitioner regarding waiver of the right to judicial determination of substantive arbitrability questions which are submitted to and decided by the arbitrator. The grievance timeliness issue decided by the arbitrator in the underlying grievance in this case was a question of procedural arbitrability, rather than a question of substantive arbitrability as found by the Sixth Circuit below. As a procedural question, grievance timeliness was a matter for the arbitrator to decide and not the court, and Petitioner thus is not entitled to judicial determination of the issue as argued to this Court. The Sixth Circuit, therefore, reached the correct result in its refusal to overturn the arbitrator's timeliness ruling. The purported conflict can be resolved on other grounds because this case does not present appropriate facts for resolution of the question presented for review. The Sixth Circuit's failure to find that grievance timeliness was a question of procedural arbitrability is the result of a conflict within the Sixth Circuit concerning whether such an issue is procedural or substantive. This Court does not sit to address intra-circuit conflicts or decisional confusion.

II. The Scope of the Public Policy Exception To Enforcement of Arbitration Awards.

Due to dispositive distinguishing facts in the case below, no conflict exists with other circuit courts on the

relevance of underlying employee conduct and the precision with which public policy must be defined when determining whether an arbitration award is against public policy. All of the cases which Petitioner contends are in conflict refused to enforce arbitration awards reinstating employees who engaged in misconduct while performing their job duties. The present case, in which the Sixth Circuit enforced the arbitrator's award, involved discipline for an employee's off duty conduct. When the so-called opposing circuits cited by Petitioner have been called upon to make public policy determinations in cases involving discipline of employees for off duty conduct, they have reached the same conclusion as did the Sixth Circuit here that such awards do not violate public policy. Accordingly, no true conflict exists among the circuits, and regardless of the rationale employed by the Sixth Circuit below, the same result would obtain under either of the allegedly conflicting approaches. Moreover, a subsequent case from the Second Circuit involving on duty employee misconduct is currently pending before this Court on Petition for Writ of Certiorari and would provide an appropriate vehicle for resolving the question presented by Petitioner because that case squarely presents a decisional conflict among the circuits.

ARGUMENT

I. Reasons Why The Petition Should Be Denied.

This case does not present an appropriate opportunity for this Court to decide the questions presented for review because no dispositive conflict exists between the

decision of the Sixth Circuit in the case below and the decisions of other United States Courts of Appeals. Because the case below presents determinative material factual differences from cases decided by other United States Courts of Appeals purporting to reach the same issues, no true decisional conflict exists. Thus, resolution of the issues stated by Petitioner will not change the result below, and this Court can dispose of the case at bar on other grounds.

II. This Case Does Not Present An Appropriate Opportunity To Consider Whether A Party Who Submits to Arbitration Waives The Right To Judicial Determination Of Substantive Arbitrability Questions Under A Collective Bargaining Agreement.

Before reaching the issue of whether the arbitrator's award should be vacated on public policy grounds, the Sixth Circuit in the case below was called upon to determine whether the arbitrator's ruling that the underlying grievance was timely filed was proper. Petitioner Interstate argued alternatively that the timeliness issue raised a question of substantive (subject matter) arbitrability subject to *de novo* review by the court, or that the arbitrator's ruling should not be enforced because it did not "draw its essence from the contract." Respondent Local 135 asserted that the timeliness issue was a question of procedural arbitrability subject to the "affirmative misconduct" standard of review mandated by this Court in *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 40 (1987), and that the arbitrator was exercising his proper function of contract interpretation in making his ruling.

In its decision below the Sixth Circuit determined that the timeliness issue was one of substantive arbitrability which was therefore governed by its holding in *Vic Wertz Distributing Co. v. Teamsters Local 1038 National Conference of Brewery and Soft Drink Workers of the United States of America and Canada*, 898 F.2d 1136 (6th Cir. 1990). In following its *Vic Wertz* decision the Sixth Circuit declined to engage in a *de novo* review of the timeliness issue, finding that Interstate had implicitly agreed to have the arbitrator decide the arbitrability issue by submitting the issue to the arbitrator in the first instance. Accordingly, the court below reviewed and affirmed the arbitrator's ruling on timeliness based on the standard set forth in *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), by evaluating whether the award "draws its essence from the collective bargaining agreement." 909 F.2d at 888.

Before this Court Interstate argues that the Sixth Circuit decision presents a conflict with decisions of the Seventh, Third, District of Columbia and First Circuits concerning the scope of review of substantive arbitrability questions that have been initially submitted to the arbitrator. This case is not ripe for the resolution of the issue posed by Petitioner, however, because resolution of the supposed conflict will not change the result in the present case and can be made on other grounds. The apparent conflict results from confusion within the Sixth Circuit concerning whether grievance timeliness issues are procedural or substantive, an intra-circuit problem not appropriate for this Court to address.

The arbitrability issue below concerned the arbitrator's ruling on the timeliness of the grievance. An initial

determination that is necessary to ascertain the appropriate standard of judicial review is whether the question is a matter of procedural arbitrability or substantive arbitrability. If the issue is procedural, *Misco* instructs that courts must not disturb the arbitrator's ruling unless it amounts to "bad faith" or "affirmative misconduct." *Misco*, 484 U.S. at 40. Only if the issue is one of substantive arbitrability does it raise the question presented by Petitioner here of whether the courts should determine the matter *de novo* after an arbitrator has ruled on the arbitrability issue.

The conflict within the Sixth Circuit arises from cases in which it has found grievance timeliness to be a procedural question and other cases in which it has found timeliness to be a matter of substantive arbitrability. Compare *Local 12934 of International Union District 50, UMW v. Dow Corning Corp.*, 459 F.2d 221, 223-24 (6th Cir. 1972) and *Chambers v. Beaunit Corp.*, 404 F.2d 128, 131 (6th Cir. 1968) (both treating the question of whether a grievance is timely filed as a procedural question for the arbitrator to determine) with *General Drivers, Warehousemen and Helpers, Local Union No. 89 v. Moog Louisville Warehouse*, 852 F.2d 871 (6th Cir. 1988) (holding that grievance timeliness was a substantive arbitrability issue to be decided by the court), and *Vic Wertz*, 898 F.2d 1136 (implicitly finding that the timeliness issue was substantive).

Largely in an effort to avoid resolving the procedural/substantive conflict over grievance timeliness raised by its decision in *Moog*,¹ the Sixth Circuit in the

¹ The Seventh Circuit has observed that the *Moog* decision is an anomaly at odds with decisions in eight other circuits. *Chicago Typographical Union v. Chicago Sun-Times*, 860 F.2d 1420, 1424 n. 4 (7th Cir. 1988).

case at bar incorrectly determined that the timeliness issue before the arbitrator was a matter of substantive arbitrability. Nevertheless, the Sixth Circuit rendered the correct decision on the ultimate issue of whether the arbitrator's ruling on grievance timeliness should be disturbed by the courts. While its rationale may have been based on an incorrect assumption regarding the timeliness issue, its *decision* that the arbitrator's timeliness determination should not be disturbed on review does not conflict with the decisions of other circuit courts upholding timeliness determinations. The rationale premised upon the misplaced finding that the timeliness issue was a matter of substantive arbitrability is the result of an intra-circuit decisional conflict which is not a matter for this Court to resolve.²

No conflict among the circuits exists because the Sixth Circuit's decision in this case can be justified on alternative grounds that do not raise a conflict. The applicable contract language in the present case permits a grievance to be filed within fifteen (15) days of "its occurrence or the parties' awareness thereof," and provides that an untimely grievance shall "automatically be decided in favor of the defending party." The contract

² Petitioner has not raised the *Moog* question as appropriate for review here, presumably because Interstate prevailed on that issue below. Moreover, its Petition to this Court on the standard of review depends upon the Sixth Circuit following *Moog*. As argued *infra*, the contract language here is distinguishable from the language in *Moog* so that even an application of the *Moog* analysis would result in a finding that the timeliness issue here was procedural. This case, therefore, does not genuinely raise the *Moog* issue either.

contains no language which bars arbitrability of an untimely grievance sufficient to even arguably transform the issue into one of substantive arbitrability under the reasoning of *Moog*, 852 F.2d at 873, where the contract specifically stated that untimely grievances "shall not thereafter be arbitrable." The *Moog* court, in fact, distinguished contrary cases on this basis. Because the contract here contains no such bar to arbitration, the timeliness issue, including the arbitrator's finding that the discipline issued was a "continuing violation," is a procedural matter that this Court has long held to be for the arbitrator and not for the courts. *John Wiley & Sons v. Livingston*, 376 U.S. 543, 557 (1964). In fact, one of the pre-arbitration procedural issues raised in *Wiley* concerned the time limitations in the grievance procedure and whether the violations were continuing in nature. *Id.* at 556 n. 11. In *Wiley* the relevant contract language stated that failure to timely file a grievance "shall be construed and be deemed to be an abandonment of the grievance." *Id.* This language is not materially different from the contract language in the case at bar, compelling the conclusion that the timeliness issue was, in fact, a procedural issue for the arbitrator and not a substantive issue for the court to decide *de novo*. The case at bar, then, does not legitimately present the question of the appropriate scope of review of an arbitrator's ruling on a substantive arbitrability issue.

As a procedural issue for the arbitrator to decide, the appropriate standard of review is the "affirmative misconduct" standard enunciated in *Misco*, 484 U.S. at 40. This standard is more deferential to the arbitrator's determinations than the standard of whether the award "draws its essence" from the contract which was actually

applied by the Sixth Circuit below. Reviewed as a procedural ruling, therefore, the result would be the same as that reached by the court below and the arbitrator's ruling would remain undisturbed.

Even assuming, *arguendo*, that the grievance timeliness issue was a matter of substantive arbitrability and that the court was required to render a *de novo* review of the issue as argued by Petitioner, the result reached by the Sixth Circuit would not be changed. Although based on whether the arbitrator's decision on the issue drew its essence from the agreement, the discussion of the timeliness issue by the Sixth Circuit in the decision below demonstrates that the arbitrator reached the same result that would be reached upon a *de novo* review of the issue:

The arbitrator determined that under the Agreement Furst's delay in filing the grievance resulted in his having waived the right to challenge the suspension of April 21, 1984. Despite this delay, the arbitrator concluded that the grievance was arbitrable as a continuing grievance that could be grieved at any time, "even though that grievance emphasizes the act of suspension rather than its continuing nature." Arb. Award at 6. Interstate contends that in so ruling, the arbitrator ignored the "unambiguous" language in Article VII, Section 3(a) of the Agreement requiring that a grievance be filed within fifteen (15) days of "its occurrence or the parties' awareness thereof." [sic] Specifically, Interstate contends that the conclusion that Furst had waived his right to challenge the April 21, 1984 suspension should have been the end of the arbitrator's inquiry.

* * *

Here, the arbitrator's finding that the suspension was a "continuing act" or "occurrence" which could be grieved at any time does not appear to be based upon a misreading or modification of the language of the Agreement. The indefinite nature of Furst's suspension contemplated a continuing, day-to-day suspension (i.e., "occurrence"), the termination of which was to be conditioned upon a future event, the proving of his innocence, [sic] Rather, the arbitrator was construing the terms of the agreement, in particular the terms "occurrence" and "awareness," in light of an indefinite suspension pending the conviction or acquittal of an employee in a criminal case. Because we fail to see any inconsistency or contradiction between this ruling and any other language in the Agreement and we further find that the arbitrator was at least "arguably construing" the contract, we conclude that his decision on arbitrability draws its essence from the collective bargaining agreement.

* * *

The result sought by Interstate, as argued by the Union to the arbitrator, places Furst in a "twilight zone," both with and without a job, with no foreseeable means of escape.

909 F.2d at 891-92. Interstate here placed the grievant on an indefinite suspension, the continuation of which was conditioned upon the future event of the outcome of criminal proceedings against him. Such a *sui generis* form of discipline can be judged *only* on the basis of subsequent events, unlike a discharge or a suspension for a definite length of time. *Brown v. Dept. of Justice*, 715 F.2d 662, 669 (D.C. Cir. 1983). Clearly, the grievance here was

arbitrable because it was filed within fifteen (15) days of "its occurrence or parties' awareness thereof."

Whether the issue is resolved *de novo*, then, or deference is given to the arbitrator's determination of the timeliness question as a procedural issue, the result in the case would be the same and no justification remains to review this case since no conflict with decisions in other circuits can be shown. Petitioner nevertheless attempts to convince this Court to review the allegedly erroneous rationale employed by the Sixth Circuit to reach its correct result by raising the ominous specter of opening the floodgates of litigation and interfering with the federal policy favoring arbitration of labor disputes. This last ditch argument is both speculative and specious.

Interstate first argues that, at least in the Sixth Circuit, all questions regarding arbitrability will now be litigated in federal courts prior to arbitration because employers will fear the standard of review adopted by the Sixth Circuit for post-arbitration challenges of determinations regarding substantive arbitrability. Such speculation ignores at least two salient factors. First, an employer may nevertheless choose an arbitral determination of arbitrability rather than a judicial determination in the first instance for many reasons, including estimation of the likelihood of success, the greater expense of litigation and the delay involved. Second, the parties can easily circumvent the Sixth Circuit rationale by expressly agreeing, either on an *ad hoc* basis or as part of the contract, that *de novo* review of the substantive arbitrability issue is not waived by submitting it to arbitration.³

³ The Sixth Circuit implicitly acknowledged this solution to potential waiver in *Vic Wertz* when it noted that the parties

(Continued on following page)

A court would be required to effectuate such an agreement as it does any other term of an agreement between the union and the employer.

The flood-of-litigation argument should be rejected for the further reason that the problem exists within the Sixth Circuit due to decisional conflicts within the Circuit concerning the nature of the timeliness challenge to arbitration as noted above. Because of *Moog* parties in the Sixth Circuit may be unsure whether their contract language renders a timeliness challenge a matter of procedural arbitrability for arbitral determination or substantive arbitrability for judicial determination. It is not for this Court to protect the Sixth Circuit Court of Appeals against a flood of litigation caused by the confusion arising out of its own decisions. Further, because timeliness issues are in actuality procedural as argued *supra*, employers and unions within the Sixth Circuit are not detrimentally affected by the standard of review that Circuit currently applies to timeliness determinations by the arbitrator.

In sum, Petitioner failed to show that water will be pouring through the floodgates due to the decision in this case. In fact, the rationale of which Petitioner is so fearful was not adopted by the Sixth Circuit in the case below, but was first announced in *Vic Wertz*, decided March 22, 1990, and Petitioner has not sought to prove that the

(Continued from previous page)

submitted the arbitrability issue to the arbitrator "without reservation." 898 F.2d at 1140.

predicted horror of litigation has come to pass. This red herring ground for review should be rejected out of hand.

III. This Case Does Not Present A Clear Conflict With Other Circuits On The Issue Of Whether The Arbitrator's Award Should Be Vacated On Public Policy Grounds.

Petitioner argues that the decision in this case raises a clear conflict with decisions in other circuits on the question left open by this Court in *United Paperworkers International Union, AFL-CIO v. Misco*, 484 U.S. 29, 45 n. 12 (1987). Contrary to Petitioner's contention, however, the Sixth Circuit below did not answer the open *Misco* question because this case did not present appropriate facts upon which to resolve the question. Moreover, the purported decisional conflict with other circuit courts is a conflict of rationale only which does not affect the result below because this case is factually distinguishable from the cases decided in other circuits. If any conflict exists upon which this Court should grant review, it is a conflict between the Second Circuit Court of Appeals decision in *Newsday, Inc. v. Long Island Typographical Union*, No. 915, CWA, AFL-CIO, 915 F.2d 840 (2nd Cir. 1990), which is presently pending before this Court on Petition for Writ of Certiorari in Cause No. 90-1166 and the decision of the Ninth Circuit in *Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173, International Association of Machinists and Aerospace Workers*, 886 F.2d 1200 (9th Cir. 1989), cert. denied, ___ U.S. ___, 109 L Ed 2d 531, 110 S.Ct. 2205 (1990).

Petitioner's erroneous contention that this case presents a conflict over the question left open in footnote 12

of the *Misco* decision stems in part from confusion over the precise question left open in *Misco*. Because the facts did not warrant it, this Court in *Misco* expressly declined to resolve an issue presented to it on argument:

We need not address the Union's position that a court may refuse to enforce an award on public policy grounds only when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law.

484 U.S. at 45 n. 12. The Ninth Circuit in *Stead Motors*, 886 F.2d at 1212 n. 12, interprets the reserved *Misco* question as the precision with which a public policy must be defined, i.e., whether a challenging party "must demonstrate that enforcement of the award would actually violate 'a statute, regulation or other manifestation of positive law.'"⁴ Interstate, on the other hand, contends that a second open question in *Misco* is whether a court should evaluate enforcement of the arbitrator's award (i.e., the relief ordered) or the grievant's underlying conduct when assessing whether public policy will be violated.

Local 135 contends that the Ninth Circuit is correct in its delineation of the question reserved by the *Misco* court. Like the *Stead Motors* court, then, the Sixth Circuit

⁴ Because the Ninth Circuit held that *Misco* requires a demonstration that the relief ordered by the arbitrator violates public policy rather than the underlying conduct which gave rise to the grievance, the court expressly stated that it left open the question reserved in *Misco* concerning how precisely public policy must be defined since it was not necessary to reach that issue under the facts presented.

in this case did not address the *Misco* question because the precise scope of the public policy was not sufficiently at issue once it was determined that the arbitrator's award was at issue and not the grievant's underlying conduct.

The *Stead Motors* court correctly interpreted *Misco* to require an evaluation of the arbitrator's award in determining the public policy question. In *Misco* this Court merely reiterated and explained its holding in *W.R. Grace & Co. v. Local Union 759, International Union of the United Rubber Workers*, 461 U.S. 757 (1983). This Court in *W.R. Grace* was called upon to determine whether the relief of back pay for seniority violations in conducting layoffs ordered by the arbitrator violated public policy because it penalized the employer for complying with a Title VII conciliation agreement. The *Misco* court thus noted that the *W.R. Grace* decision "turned on our examination of whether the *award* created any explicit conflict with other 'laws and legal precedents'" [emphasis added]. 484 U.S. at 43. The issue with which the *Misco* court grappled was the manner in which the lower court ascertained and defined public policy, and not whether enforcement of the reinstatement award rather than the employee's underlying conduct violated public policy, a question which was settled by *W.R. Grace*. In *Misco* which also involved the discharge of an employee for a drug related offense, the Court considered whether "his reinstatement would actually violate the public policy identified. . . ." 484 U.S. at 44. The arbitral relief (reinstatement in the case of a discharge), then, is the conduct to be measured against the identified public policy, and not the employee's conduct which led to the discharge.

Accordingly, the Sixth Circuit correctly dealt with the question presented in accordance with *Misco* by evaluating whether reinstatement of the grievant violated public policy, rather than whether the conduct which led to his discharge violated criminal laws or some other identified public policy as argued below by the Petitioner. Just as this Court did in *Misco*, the Sixth Circuit evaluated the lower court's attempt to define public policy and properly concluded that "[t]he district court failed to identify any law or legal precedent with which that arbitrator's reinstatement order would conflict." *Interstate Brands*, 909 F.2d at 893. While the district court, as Interstate notes, did make reference to state laws outlawing driving under the influence, the Sixth Circuit's conclusion that the district court failed to adequately identify an applicable public policy is nevertheless correct because the grievant was not arrested or convicted for driving under the influence, and more importantly, did not engage in the cited misconduct in the performance of his job duties. Therefore, the reliance on state intoxication laws is misplaced as noted by the Sixth Circuit:

While it is indisputable that allowing intoxicated persons to drive motor vehicles violates public policy, it does not follow, however, that any arbitration award reinstating an employee discharged for being intoxicated while off-duty, or arrested for off-duty possession of controlled substances may never be enforced without violating the public policy exception of arbitration awards.

Id. Since no applicable public policy was identified by the district court, the present case parallels *Stead Motors* and does not present a vehicle for this Court to answer the

question reserved in *Misco* concerning the precision with which the public policy must be defined. In contending that this case provides an opportunity for this Court to answer the *Misco* question, therefore, Petitioner is wrong.

Regardless of whether the *Misco* question was addressed in this case, review is nevertheless inappropriate because no clear conflict exists between the decision in this case and that in other circuits. Interstate contends that decisions in the Eleventh, Eighth, Fifth⁵ and Second Circuits conflict with the decision in the case at bar. Interstate further contends that the Sixth Circuit has aligned itself with the Ninth Circuit in *Stead Motors* in resolving the public policy issue. Even assuming, *arguendo*, that the important conflict to be resolved is the relevance of the employee's underlying misconduct to the public policy determination, the case at bar does not present a true conflict on this issue because the determinative material facts are distinguishable from the cases in other circuits. The underlying misconduct in the case at bar is not sufficiently connected with the grievant's employment to warrant finding a public policy violation even under the standard applied in the Eighth and Eleventh Circuits.

⁵ It should be noted that the cited decision from the Fifth Circuit, *Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local Union 540 vs. Great Western Food Company*, 712 F.2d 122 (5th Cir.), *reh'g den.*, 717 F.2d 1399 (1983), is a pre-*Misco* decision and therefore does not present an appropriate ground for review on the basis of a conflict among the circuits. Especially since this Court in *Misco* reversed the Fifth Circuit on the issue, it would be improvident to grant review based on an alleged conflict with a circuit court decision issued before the circuit had an opportunity to be guided by *Misco*.

In both *Delta Air Lines v. Airline Pilots Association International*, 861 F.2d 665 (11th Cir. 1988), *reh'g den. en banc*, 867 F.2d 1431, *cert. denied*, ___ U.S. ___, 107 L.Ed.2d 154, 110 S.Ct. 201 (1989), and *Iowa Electric Light & Power Co. v. Local 204 of the International Brotherhood of Electrical Workers*, 834 F.2d 1424 (8th Cir. 1987), the employee misconduct occurred in the performance of the employees' job duties, unlike the instant case which involved off duty conduct. The Eleventh Circuit in *Delta Air Lines*, in fact, belabored this critical distinction. The court distinguished its own prior decision in *Florida Power Corp. v. International Brotherhood of Electrical Workers*, 847 F.2d 680 (11th Cir. 1988), and *Misco* on the ground that the employee misconduct (which in both cases was drug-related) was "off company time" unlike the on duty conduct at issue in *Delta Air Lines*. With on duty conduct it is "the employee *qua* employee who is the wrongdoer." 861 F.2d at 671. The *Delta Air Lines* court reasoned that it was the grievant's "employment which made his intoxication violate the law and public policy" [emphasis added]. *Id.* The Eleventh Circuit thus defined the proper question under *Misco* to be "'Does an established public policy condemn the performance of employment activities in the manner engaged in by the employee?'" [emphasis added], 861 F.2d at 671, and not whether the employee's conduct "in the abstract" violated public policy. *Id.* This distinction is critical and explains the Eleventh Circuit's prior decision in *Florida Power*, which rejected a public policy challenge to the reinstatement of an employee who was arrested off duty for driving while intoxicated and for possession of cocaine.

While *Delta Air Lines* involved an employee who was intoxicated on duty, *Iowa Electric* involved an employee who deliberately violated a federally mandated safety regulation in the performance of his duties at a nuclear power plant. As in *Delta Air Lines*, it was the grievant's performance of his job duties that rendered his conduct a violation of public policy.

The importance of the off duty nature of the employee misconduct to the courts which choose to evaluate the underlying employee conduct is highlighted by a pre-*Misco* decision in the Fifth Circuit, *Oil Chemical and Atomic Workers International Union, Local 4-228 v. Union Oil Company of California*, 818 F.2d 437 (5th Cir. 1987). Even before this Court reversed the Fifth Circuit in *Misco*, that court in *Union Oil* found that an arbitrator's award reinstating an employee guilty of off duty drug use did not violate public policy. While the Fifth Circuit was concerned about evidence of post-award drug use by the employee, it remanded the case to the arbitrator to make the determination of whether the subsequent conduct rendered reinstatement against public policy. Given the Fifth Circuit stance on off duty drug use, Interstate has erroneously listed the Fifth Circuit as a court in conflict with the Sixth Circuit in the case below involving off duty conduct.

In contrast to the on-the-job employee conduct at issue before the circuits cited by Petitioner, the employee conduct at issue here occurred off duty and off company premises. The grievant, Randy Furst, and a friend were approached by a police officer while they were parked in a van on the side of the road on their way home from a Cincinnati Reds baseball game in Cincinnati, Ohio. It is

uncontroverted that Furst was sitting in the passenger seat of the van and there is no evidence or finding that he ever drove the van. Furst was subsequently arrested and indicted in Kentucky for possession of cocaine, marijuana and drug paraphernalia. Upon the police officer's recommendation, Furst entered into a criminal diversion program which he successfully completed, including participation in a rehabilitation program, and all criminal charges against him were ultimately dropped.

Furst was thus apprehended on his day off, and away from company premises in contrast to the employee charged with marijuana possession in *Misco*. Furst's conduct, therefore, was in no way connected with his employment and is more akin to the conduct of the employee in *Misco* rather than to the employee in *Delta Air Lines* and *Iowa Electric*. Especially in light of the Eleventh Circuit's decision to uphold the arbitrator's award regarding off duty drug trafficking in *Florida Power* it cannot be said that the Eleventh and Eighth Circuits would reach a different conclusion on the facts presented in the instant case. The nexus between Furst's misconduct and his performance of his employment duties is insufficient to establish a public policy violation by his reinstatement.⁶ Applying the question posed by the Eleventh

⁶ The Tenth Circuit has emphasized the importance of the connection between the misconduct and the employee's job duties even with on duty misconduct, and has distinguished *Delta Air Lines* on that basis. *Communications Workers of America v. Southeastern Electric Cooperative of Durant, Oklahoma*, 882 F.2d 467 (10th Cir. 1989) (upholding reinstatement of employee engaged in on-the-job sexual harassment).

Circuit in *Delta Air Lines*, whether public policy condemns the performance of employment activities in the manner engaged in by the employee, no public policy violation can be established because Furst engaged in no misconduct while performing his employment activities.

Interstate attempts to avoid this result by inviting this Court to engage in the very impermissible fact-finding that was expressly prohibited in *Misco*. Thus, as noted in the Statement of the Case, *supra*, Interstate asks this Court to find facts and draw inferences beyond those found by the arbitrator by referring to testimony upon which there was conflict and seeking consideration of facts which the arbitrator effectively excluded (the post-suspension DWI convictions).

The error of such an inquiry is highlighted by this Court's analysis in *Misco*. The employee in *Misco* was arrested after being apprehended in the backseat of his car in the company parking lot with marijuana smoke in the air and a lighted marijuana cigarette in the front seat ashtray. A warrant search of his house also revealed marijuana. He was arrested and charged with possession of marijuana. An arbitrator reinstated the employee in part because the company failed to prove that he had possessed or used marijuana on company property.

Assuming for the sake of argument only the existence of a public policy against performance of the employee's job duties (operation of dangerous machinery) while under the influence of drugs, this Court went on to find that no violation of that policy was demonstrated. This Court found that it was improper for the Court of Appeals to draw the inference that illegal drugs in the

employee's car in the company parking lot established "actual use of the drugs *in the workplace . . .*" [emphasis added]. *Misco*, 484 U.S. at 44. The *Misco* court made clear that a public policy violation could be premised *only* upon a finding that the employee actually performed his job duties under the influence of drugs. This Court explained the impermissible speculation of the lower court on this issue as follows:

To conclude from the fact that marijuana had been found in Cooper's car that Cooper had ever been or would be under the influence of marijuana while he was on the job and operating dangerous machinery is an exercise in fact finding about Cooper's use of drugs and his amenability to discipline, a task that exceeds the authority of a court asked to overturn an arbitration award. . . . Had the arbitrator found that Cooper had possessed drugs on the property, yet imposed discipline short of discharge because he found as a factual matter that Cooper could be trusted not to use them on the job, the Court of Appeals could not upset the award because of its own view that public policy about plant safety was threatened.

484 U.S. at 44-45.

In the case at bar, no finding was made that Furst used drugs on the job or that he was likely to, although that is just the factual finding that Interstate asks this Court to make in overturning the arbitrator's award. The fact that the arbitrator here reinstated Furst is the result of his implicit findings that Furst is either amenable to the discipline imposed or can be trusted not to perform

his job duties under the influence of drugs or alcohol.⁷ These findings by the arbitrator are what the parties bargained for.

If Interstate is not requesting this Court to engage in impermissible fact finding regarding Furst's use of drugs on the job and his amenability to discipline, then the only argument Interstate can be making is that if an employee's conduct violates some law or well defined and dominant public policy, regardless of its nexus to performance of his job duties, a reinstatement award is unenforceable as against public policy. Such an approach would render arbitration of discipline cases a hollow formality. Interstate effectively seeks to have this Court find that an employee whose conduct, off duty or otherwise, has violated some law or regulation governing his conduct in society, e.g., traffic laws, gambling laws, criminal laws against such offenses as assault and battery, writing bad checks, tax evasion, etc., would be unenforceable. This approach, which invites courts to look beyond the legality of the arbitration award to the legality of the grievant's conduct, permits no limiting principles and

⁷ Interstate places undue emphasis upon Furst's post-award 1986 impaired driving offenses and contends that the court should have considered them. In his supplemental award, the arbitrator declined the opportunity to accord weight or relevance to the post-discharge offenses and the Sixth Circuit appropriately declined to circumvent the arbitrator's judgment. Even the Fifth Circuit, a court which Interstate lists in the opposing camp, agrees that the effect on reinstatement of such post-award behavior is solely for the arbitrator to determine. *See OCAW, Local 4-228 v. Union Oil Company of California, supra.*

totally undermines the federal policy favoring arbitration.⁸

Misco does not permit such an approach and teaches that an arbitrator's bargained-for award of reinstatement constitutes an implicit finding that the employee is not likely to engage in the misconduct on the job in the future, whether or not he did in the past. A court is not permitted to second guess that finding. Assuming, as did the *Misco* court, that the applicable public policy is prohibition against Furst's operation of his company vehicle while under the influence of drugs or alcohol, no violation of that policy has been shown in this case because there has been no finding regarding Furst's "actual use of drugs in the workplace" or even his use of drugs while operating a motor vehicle off duty. The facts of this case, therefore, fail to present the precise issue decided in *Delta Air Lines* and *Iowa Electric*, and most recently by the Second Circuit in *Newsday*, concerning the appropriate consideration to be given employee misconduct that occurs *on the job* and violates some law, legal precedent or other well defined and dominant public policy.

Admittedly, the Ninth Circuit in *Stead Motors* answered that question differently than did the Eleventh, Eighth and Second Circuits. And unlike the case at bar,

⁸ See 29 U.S.C. §173(d), which codifies this policy as follows:

Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

Stead Motors concerned an employee's misconduct in the performance of his job duties (an auto mechanic's failure to properly tighten lug bolts). This Court should not grant certiorari in the case at bar even if it determines that this conflict requires resolution. The union in the subsequently decided Second Circuit *Newsday* case has filed a Petition for Writ of Certiorari in this Court in Cause No. 90-1166. Unlike the case decided by the Sixth Circuit below, *Newsday* involved an employee who engaged in misconduct while on the job. The *Newsday* court appears to have adopted the approach of the Eighth and Eleventh Circuits, which looks to the public policy outlawing the employee on-the-job misconduct rather than to public policy outlawing reinstatement of an employee who engaged in on-the-job misconduct as did *Stead Motors*. If an important conflict among the Circuits is perceived and this Court finds it appropriate to resolve that conflict, then review should be granted in *Newsday* where the facts are materially identical to those in opposing circuits.

In the case below, no real conflict exists because application of the opposing approach would render the same result, i.e., enforcement of the arbitrator's award. Just as the Eleventh Circuit upheld the reinstatement for off duty misconduct in *Florida Power* enforcement was the proper result here, regardless of which approach is proper with regard to on duty conduct.

CONCLUSION

This case does not present an appropriate opportunity for this Court to address the two questions presented for review because material factual differences between the present case and the cited conflicting cases enable this Court to uphold the decision below on other grounds without resolving the purported conflict. The proper result was reached by the Sixth Circuit on all issues presented, and it would be improvident for this Court to grant review when the case below can be factually distinguished without reaching the questions presented for review. For all of the reasons argued above, Respondent urges this Court to deny the Petition for Writ of Certiorari in this case.

Respectfully submitted,

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APPENDIX
[1] ARBITRATION

INTERSTATE BRANDS	:	FMCS NO. 85 K/01426
CORPORATION, Butternut	:	
Bread Division	:	
Teamsters 135	:	

Grievance of Randy	:	GRIEVANCE
Gene Furst	:	NO. 71167

TRANSCRIPT OF PROCEEDINGS

The above-entitled cause came on for Arbitration before Arthur Porter, Jr., at the offices of Frost & Jacobs, 2500 Central Trust Center, on Tuesday, February 26, 1985, at 10 o'clock a.m.

* * *

[44] inserted the needle. Other than that, I can't remember any bruises. There may have been from the past, you know, needles but I'm not positive.

Q. You said that he indicated to you he had some sort of problem with -

A. Yes, sir. Yes, sir, he did.

Q. With what?

A. With cocaine.

Q. Did he indicate how long had he been using it?

A. He couldn't remember. He told me for quite some time he had been injecting cocaine which is unusual to find people who actually mainline cocaine. He said he had been shooting up several times a day because of the habit.

Q. When and where did he make that statement?

A. It was at our station headquarters.

Q. In your presence?

A. Yes, sir.

Q. And who else was present?

A. I believe my lieutenant was there at the time, Lieutenant Watts.

Q. Was that statement recorded in any way?

A. It was on tape or anything like that, no, it was not. I may have recorded it in my report. No, it's not recorded in the report.

[45] Q. I notice that that is not anywhere indicated in your report which is Company Exhibit 1. Is there any reason why you omitted that from the report?

A. None, other than I didn't feel it was necessary.

Q. You didn't feel that a statement like that was necessary to be in the report?

A. No. It would - I felt it would not have had any outcome as far as, you know, the possession charge goes in court.

Q. Was Mr. Furst released after a short stay in jail?

A. He was let out on bond. I'm not sure what the bond was.

Q. Do you know how long he served in jail?

A. I really couldn't tell you.

Q. Was it just a short period for the processing and the setting of the bond?

A. I would say he probably got out either late on the 11th or early on the 12th. I'm not positive when he did get out though.

Q. Was there any indication or evidence that Mr. Furst or did you observe Mr. Furst at any time operating the van -

[46] A. No, sir, I didn't.

Q. - That you found him in?

A. No.

Q. Which seat was he sitting in?

A. He was in the passenger seat.

Q. Did you ask who had been driving the van?

A. Yes, I did. Mr. Meisberger stated, along with Mr. Furst, that Mr. Meisberger was driving it. That's who I saw get out of the driver's side at the time.

Q. Did you observe Mr. Furst using or injecting cocaine?

A. No, sir, I did not. Not at that time.

Q. Did you request that a blood test be run or be conducted?

A. I did not, no, for the simple reason that he was not the driver of the vehicle and he was not charged with driving under the influence of alcohol. I just wanted him checked out by the paramedics and possibly the hospital to make sure he was safe to be placed in the county jail.

Q. Is it usual that after apprehending someone in the possession of drugs that you would not have him subjected to a blood alcohol or blood test or some sort?

A. Is that unusual?

Q. Is that unusual or usual?

* * *

[128] Q. What time did you leave in the morning?

A. I would say around 10 o'clock in the morning. The game would have been around 2 o'clock game, somewhere in that neighborhood. We gave ourselves enough time to get to the ball game.

Q. Did you take anything with you?

A. As in what?

Q. Did you take anything with you in the van or in the -

A. I took a cooler of beer.

Q. Did your friend have anything with him?

A. Yes, he had the substance with him.

Q. Prior to April the 11th had you ever experimented with cocaine or some other substances?

A. Yes, I had.

Q. And when did you first -

A. It was probably about a week to ten days before that I was with that guy another time before and he got me started on it.

Q. Prior to that you had never experimented with it?

A. No, sir.

Q. Did you ever inject cocaine at any time on April 11th or prior to April the 11th?

[129] A. No, sir.

Q. Tell us what happened. You went to the ball game, did you drink some beer at the ball game?

A. Yes, sir, we drank beer at the ball game and was on our way back.

Q. And tell us what happened from that point?

A. Well, it's closer to go through 275 to where we live, so we started that direction and the van was running hot. We pulled if off the side of the road to let it cool a little, and that's when Officer Bunning proceeded to arrest us.

Q. Whose cocaine and paraphernalia was that that Officer Bunning brought with him?

A. It belonged to Mark Meisberger.

Q. Did you inject any cocaine on that day?

A. Not on that day I did not.

Q. Did you have any needle marks in your arm?

A. I had some scratches on my arm, up and down my arms. I have might have had one. I didn't have all the markings that was said that I had.

Q. At this time were you a regular cocaine user?

A. No, sir.

Q. Have you used cocaine at any time since April the 11th?

[130] A. About a week prior. I just got with the wrong -

A. After your arrest did you -

A. Oh, no, sir.

Q. How did you let the company know that you had been arrested? What did you do to inform the company or did you do anything?

A. When I was arrested I called my brother-in-law, which is an employee at Butternut, I told him to call the supervisor and tell him I was in jail and it would probably be Thursday, my next scheduled day to work, that I would get out so I was going to have to stay a day and have to take a day off from work.

Q. When were you released from jail?

A. Thursday about 2 o'clock in the afternoon.

Q. At the time of your arrest had you ever had any trouble with the law at all?

A. No, sir.

Q. I think there is already sufficient evidence in the record as far as the criminal proceedings that occurred after your arrest. You did then enter into or your attorney did on your behalf enter into a diversion agreement with the state of Kentucky?

A. Yes, sir.

* * *

[132] A. Yes.

Q. I see. And I take it that you have never then been tried on the charge of possession of cocaine?

A. No, sir.

Q. Did you ever receive any letter of suspension from the company?

A. No, sir.

Q. I think the grievance bears a date. Why did you file the grievance on the date that you filed it?

A. Okay. I called Pete and told him I was being suspended and he said well, did you get your letter of suspension and I said no. He said well, we have got to wait for a letter of suspension before you can really file a grievance.

So in the meantime Pete, I guess, was on vacation and when I come back he had to go to the hospital. Well, a friend of mine had talked to a union representative from Edinburg which is Dick Romeril and Dick told me - I was telling him about my case and he said for me to get down there and file a grievance.

Q. And you did?

A. And I did.

Q. Did you at any time during the course of April 11th in your arrest ever tell any officer of Officer Bunning [133] or any other person that you were a drug addict or a cocaine addict?

A. No, sir, I never did.

Q. Did you ever state or remark to anyone that you were a frequent user of cocaine?

A. No, sir, I did not.

Q. Were you intoxicated at the time of your arrest?

A. Yes, I probably was. I had quite a few beers that day.

Q. At the time of the arrest had you injected or done any cocaine?

A. No, sir. I was scared to death when the officer pulled his gun up to my head. I have had a series before of hyperventilation and I was having trouble breathing at the time and that was the reason why I was slurring. I was nervous, I couldn't talk, I couldn't do nothing.

Q. If you were intoxicated, however, it was as a result of consumption of beer; is that your testimony?

A. Yes.

MR. GROTH: You may cross-examine.

THE ARBITRATOR: If you want a few minutes or do you want to start right in.

* * *

